Quarterly Report

of the

ATTORNEY GENERAL

of

ALABAMA

For The Period

From April 1, 1963

Through June 30, 1963

VOLUME 111

RICHMOND M. FLOWERS, Attorney General

T. O. "Tillie" Walker

QUARTERLY REPORT

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TO THE STATE, COUNTY, AND MUNICIPAL OFFICERS OF ALABAMA:

This Quarterly Report of the Attorney General of Alabama, which includes all official opinions rendered by the Attorney General from April 1, 1963, through June 30, 1963, is published in compliance with the provisions of Title 55, Section 228, Code of Alabama 1940.

Under this section of the Code, I am required to send seven copies of this Quarterly Report to each judge of probate in the State and the judge of probate, in turn, is required to deliver one copy each to the clerk of the circuit court, the sheriff, the tax collector, the tax assessor, the county superintendent of education, and the deputy or county solicitor of his county. This section also requires that I send a copy of this report to each circuit slicitor and the chief executive officer of each incorporated municipality in the State.

The office of the Attorney General is anxious to render prompt and efficient service to the State, county, and municipal officials. If you have any suggestions to make regarding the improvement of the service, I shall be glad to hear from you.

Sincerely,

RICHMOND M. FLOWERS

Attorney General

RICHMOND M. FLOWERS
Attorney General

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OPINIONS

April 1, 1963

Honorable Nelson Allen
Judge of Probate
Walker County Court House
Jasper, Alabama

Filing Tax — Mineral Documentary Tax

For purposes of mineral documentary stamp tax, instruments granting or reserving "mineral" interests discussed generally.

Opinion by Assistant Attorney General Loeb

Dear Sir:

Your request for an official opinion bearing date of January 10, 1963 is as follows:

"I enclose herewith copy of a letter I have just received from Mon. Bob Owen of the firm of Martin, Vogtle, Balch & Bingham, together with a copy of each of the deeds referred to therein.

"Will you please advise me whether or not this office was in error in making this charge; and if so, if application for refund should be made to this office or to the State Department of Revenue."

The mineral documentary tax levied by Section 16(10), et seq., Title 51, Code of Alabama Recompiled 1958, does not include the transfer of rights or interests in coal or iron ore. As pointed out in the letter to you from Bob Owen, the definition of "oil, gas, and other minerals" contained in Section 16(10), supra, expressly eliminates coal and iron ore interests as being within the contemplation of this Act. Also, this office has previously ruled that such interests are not subject to the tax in an opinion contained in Quarterly Report of the Attorney General, Volume 89, page 22.

In two of the conveyances attached to your inquiry, the grant is of "all the coal, iron ore and other minerals"; in the other conveyance the description reads "all the minerals." The language used in the first two deeds presents doubt and ambiguity as to just what minerals are conveyed. It has been held in many cases, and appears to be the weight of authority, that where ambiguity or uncertainty exists on the face of the instrument, recourse may be had to extrinsic evidence to determine the intention of the parties. Such extrinsic evidence may include the surrounding circumstances and conditions,

the use to which the property ordinarily is suited, the meaning given by the custom of the locale in which the deed is to operate, or any negotiations between grantor and grantee concerning the transaction and bearing on their intent. 58 C.J.S., Mines and Minerals, Section 2a, page 17, and Section 155c, page 322; **Holloway Gravel Co. v. McKowen,** 200 La. 917, 9 So.2d 288; **Witherspoon v. Campbell,** 219 Miss. 640, 69 So.2d 384; **Monon Coal Co. v. Riggs,** 115 Ind. App. 236, 56 N.E. 2d 672, rehearing denied 57 N.E.2d 598; **Psencik v. Wessels,** 205 S.W.2d 658 (Tex.); **Beury v. Shelton,** 151 Va. 28, 144 S.E. 629.

In the deed conveying "all the minerals," there does not appear to be any such doubt or ambiguity since, as a general rule, a grant or reservation of "minerals" includes petroleum, oil, and natural gas. 58 C.J.S., Section 155c (2), page 326, and cases cited under footnote 98. It was therefore entirely proper for you to have collected mineral documentary stamp tax upon the recordation of this particular deed.

As to the first two deeds, there is a case holding that a reservation of "all coal, iron, and minerals" included a reservation of oil and gas in the lands conveyed (**Burdette v. Bruen,** 118 W.Va. 624, 191 S.E. 360), while another case, applying the rule of ejusdem generis, held that a reservation of "iron, coal and other minerals" did not reserve oil and gas (**Huie Hodge Lumber Co. v. Railroad Lands Co.,** 151 La. 197, 91 So. 676). In each of these cases, and the many others dealing with similar grants or reservations, the courts considered the language contained in the instrument to be ambiguous and went beyond the instrument itself to determine from the surrounding circumstances, etc., **the intention of the parties.**

From the above discussion, it should be apparent that the law is far from settled as to the construction of grants or reservations such as the ones contained in the first two deeds. In making your determination, I believe that you can start with the fairly well settled proposition that such grants or reservations are, on their face, ambiguous and uncertain. Having reached that conclusion, you must then seek to determine from whatever extrinsic evidence may be presented to you or which you may call for, just what the intention of the parties was, that is, what did the parties intend to convey. It would be impossible for me to reach such a determination in the case of the two deeds in question since I have no evidence before me other than the instruments themselves.

To specifically answer your question, then, as to the first two deeds, it is my opinion that you were not in error in collecting the mineral documentary tax, since at the time such tax was paid, you had obviously reached a determination that such tax was due, and, as

above pointed out, we have no evidence before us to indicate that your decision was erroneous.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

April 1, 1963

Honorable Robert Newman, Jr.
Circuit Clerk and Register
Pike County
Troy, Alabama

Comptroller — Cost and Fees — Non-Support — Registers.

1. Reciprocal Non-Support Act is not a part of the final record of the initiating state but is a part of the final record of the responding state.

2. General discussion of fees of Register for taking testimony, affidavits and making certificates.

3. For making copies of affidavits, certificates and other papers not specifically set out otherwise the Register is entitled to twenty cents per one hundred words.

4. Register may submit supplemental cost bills to the State Comptroller.

Opinion by Assistant Attorney General Webb.

Dear Mr. Newman:

I have your request for an official opinion dated March 12, 1963, as follows:

"In cases initiating support proceedings under the Uniform Reciprocal Enforcement of Support Act, being General Act Number 879 of the 1951 Legislative Session approved Sept. 12, 1951. Cases which are initiated in Alabama and sent to another State, we have an original and three copies of all papers. The original and 2 copies are sent to the other state with a copy of the above act attached to each set of papers. One set of the papers are retained in the register's file.

"1. Is the Act included as part of the final record and should it be recorded in the final record book?

"2. The register makes or takes 5 affidavits with seal on each set which makes 20 per case, is the register entitled to 95c for each of these? (each of these are signed by petitioner and register other than one which is signed by the Circuit Judge and Register)
"3. Is the register entitled to 20c per 100 words for copy of bill or other paper, which he makes 3 of?

"In cases which are initiated in another State and sent to Alabama, should the Act of the other State be included and recorded in the final record?

"If your answer to the above questions or part of them are in the affirmative, then would the Register be entitled to file an amended cost bill with the State in the cases where the cost was taxed against the State of Alabama and be paid the difference in the fees which he has already collected and what he is due?

"I am enclosing a copy of the papers which we have to send out other than a copy of the Act. As I started before, each of them are made out in an original and 3 copies."

Assuming that the State of Alabama is the initiating state, I answer your first question in the negative. There is no requirement of law that a copy of the Reciprocal Non-Support Act be made a part of the final record of the court in the initiating state and the courts generally take judicial knowledge of acts of their own legislatures. Section 11 of Act No. 879, Acts of Alabama 1951, page 1515, as amended by Act No. 823,Acts of Alabama 1953, page 1107, however, does require that a copy of the Reciprocal Non-Support Act be transmitted with the certificate and petition to the responding state. In my opinion, the copies so transmitted become a part of the final record of the responding state. These copies should be furnished the Register by the Circuit Solicitor or other prosecuting attorney appointed by the court to represent the petitioner. Quarterly Report of Attorney General, Volume 81, page 41.

I have carefully reviewed the papers attached to your letter. They include a printed, sworn petition in affidavit form, a printed testimony sheet in question and answer form, a printed certificate for the circuit judge, a printed pauper's affidavit, plus printed standard interstate certificates by the circuit judge and register as to each other's identity and printed certificate by the register as to correctness of the record.

In counting the number of certificates and affidavits attached to your letter, I am, therefore, of the opinion that you are in error as to what constitutes an affidavit. The printed testimony sheet in

question and answer form is not, in my opinion, an affidavit. Section 9 of Act No. 879, as amended, supra, provides for taking of depositions and interrogatories and, though this sheet is not technically either, it is in the nature of such and comprises testimony of the proceedings of this case. As such, it is my opinion that the Register is entitled to twenty cents per one hundred words for taking testimony on reference. See Title 11, Section 27, Code of Alabama Recompiled 1958. For each copy made thereof, the Register shall also be entitled to twenty cents per one hundred words as copy of bill or other paper. Title 11, Section 27, supra.

As to the four affidavits and/or certificates of the register, if under seal of the court you are, in my opinion, correct in your assumption that you are entitled to ninety-five cents each. However, it is my opinion that for each copy required you are again entitled to twenty cents per one hundred words as copy of bill or other paper. Title 11, Section 27, supra.

I believe that the above discussion of your second question sufficiently covers the third question insofar as the same relates to the subject of this inquiry.

With regard to your fourth question, it is my opinion that all of the papers received by the responding state, including a copy of the Reciprocal Non-Support Act of the initiating state, become a part of the final record of the responding state by virtue of the provisions of Sections 11 and 12 of Act No. 879, as amended, supra.

As to your final question, it is my opinion that, if costs are taxed against the state pursuant to Section 15 of Act No. 879, as amended, supra, the Register may submit supplemental cost bills to the State Comptroller. Quarterly Report of Attorney General, Volume 80, page 21.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

April 3, 1963

Hon. Albert J. Lingo
Director

Department of Public Safety
CAPITOL

Courts — Inferior Courts — Justices of the Peace — Criminal Law.

Constitution of Alabama 1901, Sections 8 and 168.

1. The Court of Common Pleas of Lee County is authorized to try misdemeanors involving violation of rules of the road and other misdemeanors set out in Title 36, Code of Alabama 1940, as amended, in lieu of Justices of the Peace in said county.

2. Clerk of Court of Common Pleas not authorized to enter an order of nolle prosequi on his own motion.

Opinion by Assistant Attorney General Clark.

Dear Sir:

Your request for an official opinion, bearing date of March 26, 1963, is as follows:

"We wish an opinion upon the following question:
"An act of the 1949 Regular Session, #242, at page 361, Section 8b, amended by a 1953 Regular Session Act #338 at page 396, provides that jurisdiction of justices of the peace in Lee County, Alabama, of the offenses in Title 36, 1940 Code of Alabama, as amended is abolished, and jurisdiction of such offenses is vested solely in the Court of Common Pleas in Lee County, as court of first instance.
"Please inform us as to whether or not such a limited prohibition is constitutional.

"Also, please inform us, if the jurisdictional question is in the affirmative if the Clerk of the Common Pleas Court has an authority to enter an order of 'nolle prosequi' on charges made in that court, on his own motion."

Section 8(b) of Act No. 338, General and Local Acts 1953, Page 396, provides:

"(b) All warrants issued in Lee County for misdemeanors for violation of the rules of the road and other misdemeanors defined or provided for in the Code of Alabama 1940, Title 36, shall be

there docketed and tried. In each rule of the road case docketed there shall be imposed and collected as other costs in said case a docketing tax of two dollars ($2.00), which shall be paid into the county treasury."

The office of Justice of the Peace is provided for in Section 168 of the Constitution of Alabama 1901.

The power given to the Legislature to authorize prosecutions before a justice of the peace or inferior court is set out in Article 1, Section 8 of the Constitution of Alabama 1901, as follows:

"Sec. 8. That no person shall, for any indictable offense, be proceeded against criminally, by information, except in cases arising in the militia and volunteer forces when in actual service, or when assembled under arms as a military organization, or, by leave of the court, for misfeasance, misdemeanor, extortion, and oppression in office, otherwise than is provided in the Constitution; provided, that in cases of misdemeanor, the legislature may by law dispense with a grand jury and authorize such prosecutions and proceedings before justices of the peace or such other inferior courts as may be by law established."

In the case of **Gordon v. Medders,** 226 Ala. 576, 148 So. 135, the Supreme Court of Alabama, holding a similar act in Jefferson County constitutional, said:

"However, the act in question does not diminish the fees of the justices of the peace, nor deprive the same of uniformity, but it only withdraws from these officials the right to finally try and determine certain criminal cases. This in no way involved a violation of either section 96 or 168 of the Constitution. . . ."

Thus, it appears that the legislative act is not violative of the Constitution of Alabama of 1901 merely because it limits the powers of certain justices of the peace to try certain criminal matters.

My answer to your first question is in the affirmative.

The proper manner of entering an order of "nolle prosequi" is by the solicitor, with the consent of the court. **Jackson v. State,** 21 Ala. App. 284, 107 So. 725. The deputy solicitor of Lee County is the solicitor for the Court of Common Pleas of Lee County.

My answer to your second question is in the negative.

Yours very truly,
RICHMOND M. FLOWERS
Attorney General

April 4, 1963

Honorable Cecil G. Chason
City Attorney
City of Foley
Foley, Alabama

Contracts — Licenses — Municipalities — Public Utilities.

1. A municipality may contract to grant a franchise to a public utility for a consideration.

2. The consideration paid by a public utility for a municipal franchise may be in excess of the maximum amount which a municipality may charge such public utility as a privilege license.

3. A right to operate a public utility is not superseded by the subsequent incorporation of a municipality within the territory served.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion, under date of April 2, 1963, is as follows:

"As Attorney for the City of Foley, I respectfully request your opinion upon the questions set out below.

"Under Act 175 of the 1951 Legislature the City of Foley appointed a utilities board to manage and control the activities and affairs of our electric system. This action was taken in 1952, by the City of Foley, and the electric system has been operated by this utility board since that time.

"With the approval of the City Council of the City of Foley, this utility board has authorized payment of sums which we call tax equivalent to the various municipalities in South Baldwin County, where we have franchises. For the last number of years all of these municipalities have been paid 3 per cent of gross revenue generated within the corporate limits. This has been done because of the feeling of the City of Foley and utility board that benefits should be derived from the operation of the system by each of the municipalities located in our trade area and those served by us.

"The Town of Loxley, which was incorporated several years ago, was offered this 3 per cent equivalent in return for a franchise. A 4 per cent tax equivalent has been authorized for the Town of Loxley along with an authorization of a payment of 3 per cent from the date of their incorporation to the date the 4 per cent equivalent became effective upon execution and delivery by the Town of Loxley of a franchise to do business within the municipal corporate limits.

"We have, of course, a right of use of the public highways and streets where we were serving customers prior to the incorporation of the Town of Loxley. We do wish, however, a ruling on the following points as the Town of Loxley feels that they cannot legally accept any payment in excess of 3 per cent. In this connection you should also know that we are furnishing electric energy for a number of street lights in Loxley, and expect to continue to do so. Please give your opinion on the following.

"1. Does the Town of Loxley have legal authority to enter into a franchise for a consideration with our utility board of the City of Foley, to give the utility board and the City of Foley a right of use of the public streets and ways in the Town of Loxley for the service of customers of our electric system?

"2. May the City of Foley, acting through its utility board, pay an amount in excess of the 3 per cent provided by law as a maximum license for privately owned public utilities doing business in a municipality, if we are franchised under a contractual arrangement, keeping in mind that in addition to the payment of the maximum provided by law, the City of Foley, acting through its utility board, will also furnish some electric energy without charge for street lighting.

"3. Having a right to the use of public streets and highways which was obtained before the incorporation of the Town of Loxley, may we, acting by and through our utility board, continue to serve the customers presently served along these streets and highways, even though the utility board and the City of Foley are not franchised?"

When a municipality or municipal board owns and operates a public utility, it is engaged in a proprietary or business enterprise. See **Waterworks and Sanitary Sewer Board, et al v. Dean,** 260 Ala. 221, 69 So. 2d 704, and Quarterly Reports of Attorney General, Vol. 107, page 7, and Vol. 99, page 7.

Title 37, Section 439, Code of Alabama 1940, reads in part as follows:

". . . The city council may sell or lease in such manner as it may deem advisable any franchise which it has power to grant, and the moneys received therefor shall be paid into the city treasury."

Therefore, your first question is answered in the affirmative. I am of the opinion that the Town of Loxley may grant to the Utility Board of the City of Foley the proposed franchise, to which your request refers, for a consideration.

The problem presented by your second question is whether the Utility Board of the City of Foley may contract to pay the Town of Loxley for the proposed franchise an amount in excess of three per cent of its gross receipts from the sale of electricity in said Town.

Title 37, Section 745, Code of Alabama 1940, as amended by Act No. 613, Acts of Alabama 1949, page 945, limits the amount a municipality may charge a public utility as a privilege license to three per cent of the gross receipts derived from the business done by the utility within the municipality during the preceding year.

In the case of City of **Montgomery v. Montgomery City Lines, Inc.,** 254 Ala. 652, 49 So. 2d 199, the Court, referring to a local law providing that the City of Montgomery must collect an adequate consideration for the granting of franchises, stated:

". . . Such consideration may be in the nature of a specified amount or a sum measured by a percentage of the gross receipts of the utility. The percentage of the gross receipts is without limit fixed by law. But it is determined solely as the result of negotiation and contract between the city and utility and has no relation whatsoever to the right and power of the city conferred by section 745, Title 37, supra, as amended, to levy a license tax within the maximum limits there expressed. . . ."

I am of the opinion that the statements made by the Court in the above-quoted portion of said case are applicable to Section 439, supra, as well as to the local law there considered.

Therefore, your second question is answered in the affirmative.

Your third question is answered in the affirmative. A right to operate a public utility is not superseded by the subsequent incorporation of a municipality within the territory served. Cf. **Town of Fultondale v. Clelland Bus Lines, Inc.,** 254 Ala. 225, 48 So. 2d 21.

Very truly yours,
RICHMOND M. FLOWERS
Attorney General

April 6, 1963

Honorable John A. Sankey
Judge of Probate
Montgomery County
Courthouse
Montgomery, Alabama

Corporations — Fiduciaries.

1. A corporation may not legally enter into a limited partnership agreement, unless expressly authorized to do so by its charter or by statute.

2. A corporate fiduciary may participate in a partnership if permitted to do so by the trust instrument or will or by order of the Court having jurisdiction of the estate or trust.

3. A corporation may enter into a joint adventure where the nature of the enterprise is within the scope of its legitimate powers.

Opinion by Assistant Attorney General Hall.

Dear Judge Sankey:

Reference is made to your letter of March 16, 1963, requesting my opinion as to whether a limited partnership, which has a corporation as the sole general partner, and which has other corporations as limited partners may be legally formed under the applicable provisions of Alabama law.

Your letter reads as follows:

"A proposed Certificate of Limited Partnership has been submitted to me for a determination of its eligibility for filing in compliance with Title 43, Sec. 10. In the Certificate, many of the proposed limited partners are corporations. The sole general partner is also a corporation. The objects and purposes of the partnership are to carry on the development of real estate in this County.

"Title 43, Sec. 6, provides that 'two or more persons' may form a limited partnership.

"Title 1, Sec. 2, provides that the word 'person' as used in the Code shall mean not only natural persons, but corporations as well.

"May a limited partnership, which has a corporation as the sole general partner, and which has corporations as the limited partners be legally formed under the applicable provisions of Alabama law?"

Alabama follows the majority view that, unless expressly authorized to do so by charter or statute, corporations ordinarily do not have the power to become partners. **Louis Werner Sawmill Co. v. Vinson & Bolton,** (1929) 220 Ala. 210, 124 So. 420; **Central Lumber Co. v. Schilleci,** (1933) 227 Ala. 29, 148 So. 614. This limitation is based on public policy, since in a partnership the corporation would be bound by the acts of persons who are not its duly appointed agents and officers, which would be entirely inconsistent with the policy of the law that the corporation shall manage its own affairs separately and exclusively. 13 Am. Jur., Corporations, Section 823, p. 830; 68 C.J.S., Partnerships, Section 5(b), p. 408; 60 A. L. R. 2d 917, 920.

However, I find that Title 58, Code of Alabama 1940, dealing with Trusts, now has provisions in Chapter 5-A, Sections 55(1)—55(3), which permit a fiduciary, including a corporate fiduciary, to participate in a partnership either as a general or limited partner if permitted by the trust instrument or will or by order of the Court having jurisdiction of the estate or trust (Acts of 1961, No. 1011, Sections I, II and III, approved September 9, 1961). This seems to be the only exception under our law.

Nevertheless, a corporation may enter into a joint adventure where the nature of the enterprise is within the scope of its legitimate powers. See **Central Lumber Company v. Schilleci,** supra; **Louis Werner Sawmill Company v. Vinson & Bolton,** supra; 13 Am. Jur., Corporations, Section 825, p. 831; 60 A.L.R. 2d 936.

Yours very truly
RICHMOND M. FLOWERS
ATTORNEY GENERAL

April 11, 1963

Hon. Carl E. Sellers
Judge of Probate
Houston County
Dothan, Alabama

Counties — Appropriations — Recreation Board.

1. A county is authorized to lease its idle road machinery to a municipality, and rent therefor should be paid into

the fund out of which such road machinery was purchased.

2. A county is authorized to make an appropriation to the recreation board and the recreation board may in turn expend such funds to aid a municipality in the construction of a municipal stadium.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of April 4, 1963, is as follows:

"The Board of Revenue and Control of Houston County, Alabama, would like to have an official opinion based upon the following questions:

"1. The City of Dothan, Alabama is constructing a municipal football stadium on city-owned property within the city limits of the City of Dothan and has asked for the loan of certain road machinery from Houston County, Alabama, purchased out of the gasoline fund and the public highway and traffic fund, to be used by the City in the preliminary grading of the site for the new stadium. If the road machinery that the City of Dothan wants to borrow is idle, and is not being used on the roads of Houston County, Alabama; and if the City pays the County rent sufficient to refund for the depreciation caused by the use thereof, and if such rent is deposited to the funds out of which the road machinery was purchased, may the Board of Revenue and Control, by appropriate resolution, approve the loan of this road machinery to the City for the use specified?

"2. Under the provisions of Title 12, Section 12, Code of Alabama of 1940, is the Board of Revenue and Control of Houston County, Alabama authorized to make an appropriation out of the general fund of Houston County, Alabama, toward the construction of the Dothan Municipal Stadium as described in paragraph one above?
"3. Are the provisions of Title 12, Section 278, Code of Alabama of 1940 broad enough to include the authority for the Board of Revenue and Control of Houston County, Alabama to make an appropriation out of its general funds to be used by the City of Dothan in the construction of such stadium?

"4. Is it necessary for the Board of Revenue and Control of Houston County, Alabama to establish a Recreation Board under the provisions of Title 12, Section 274-279, before making such an appropriation out of its general fund; or may it make an appropria-

tion directly to the City of Dothan for the purpose or purposes above enumerated?"

My answer to your first question is in the affirmative.

Your attention is directed to an opinion of this office appearing in Quarterly Report of Attorney General, Vol. 11, page 153. This opinion is directly in point on the question propounded by you and in the circumstances and on the conditions stated in your question may be used as your authority to lease the road machinery belonging to Houston County to the City of Dothan for the purpose of aiding in the construction of a municipal football stadium.

My answer to your second question is in the negative.

I find no subdivision contained in Title 12, Section 12, Code of Alabama 1940, directly authorizing the expenditure here considered.

My answer to your third question is in the affirmative.

The provisions of Chapter 22, Title 12 (Sections 274-279), Code of Alabama 1940, are very broad. It is to be noted that Section 279 of said chapter provides that this chapter shall be liberally construed.

Section 278 is direct authority for the governing body of the county to make appropriations from county general funds to the recreation board for the support and maintenance of the board. This, in my opinion, is broad enough to authorize an appropriation by the county to the recreation board, and the board in turn may use such appropriation to aid the City of Dothan in the construction of the municipal stadium.

My answer to your fourth question is in the affirmative.

Said Chapter 22 authorizes the county to make the appropriation to the recreation board, but I find no authority contained in said chapter for the county governing body to make a direct appropriation to the City of Dothan.

It is a very simple matter to create a recreation board and if the county governing body sees fit to pass a resolution creating said board, it may appropriate its general fund money to the board for the purposes outlined in your said letter.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

April 11, 1963

Hon. C. C. (Jack) Owen
President
Alabama Public Service Commission
State Office Building
Montgomery, Alabama

Alabama Public Service Commission —

Words & Phrases

Sulphuric acid being transported to a manufacturing plant is not, at that time, a fertilizer within the meaning of Title 48, Section 301(2), subsection A(3), Code of Alabama 1940, as Recompiled 1958, so as to exempt the transportation thereof from the supervision and control of the Alabama Public Service Commission.

Opinion by Assistant Attorney General Bradley.

Dear Sir:

Your request for an official opinion, bearing date of March 28, 1963, is as follows:

"Section 301(2), Title 48, Code of Alabama Recompiled 1958, provides in subsection A(3) thereof that the act shall not be construed to apply to 'fertilizer' and certain other commodities set forth in the section referred to.

"This exemption is considered by some parties as exempting fertilizer materials as well as the finished fertilizer. One of the products that go into the manufacture of fertilizer is sulphuric acid and some of the people who ship and use this commodity for use in the manufacture of fertilizer have construed the statute referred to as exempting sulphuric acid when moved to a manufacturer of fertilizer and used in the manufacture of fertilizer.

"I will appreciate an official opinion from you as to whether or not sulphuric acid is exempt from the statute referred to generally and if not should it be considered exempt when shipped to a fertilizer manufacturer and actually used in the manufacture of fertilizer.

"Your usual cooperation is very much appreciated."

The answers to the two questions asked by you in your request for an opinion are in the negative.

The pertinent provisions of Title 48, Section 301(2), subsection A(3), Code of Alabama 1940, as Recompiled 1958, is as follows:

> "(3) Motor vehicles while used in the transportation of property when the owner of the vehicle is legally and regularly engaged in the business of selling such property and is the owner and has the legal title to the motor vehicle involved, also motor vehicles if engaged in hauling milk, livestock, coal, logs, lumber, poles, pulpwood, cotton in bales, cottonseed, fertilizer, peanuts, potatoes, or any other agricultural commodity of any kind (but not manufactured products thereof)".

In arriving at the conclusion that sulphuric acid is not a fertilizer so as to bring it within the exemption above set out, we have to define the word "fertilizer" as the Legislature intended it to be defined. The Legislature obviously wished to exempt motor vehicles from the regulatory power of the Public Service Commission when the vehicle was carrying, among other things, "fertilizer."

It is my view that the Legislative intent in this regard had reference mainly to commercial fertilizers, not however excluding altogether the natural or organic fertilizers. The Legislature was thinking of the end product, a usable product that was being hauled from the manufacturing or processing plant to the point of distribution or use.

Otherwise, it would have been more explicit, as in Title 2, Section 282, Code of Alabama 1940, as Recompiled 1958, where it was provided:

"* * * commercial fertilizer and fertilizer material * * * ." See **State v. Smith,** 55 So. 2d 130; and **State v. Rockwood Alabama Stone Co.,** 58 So. 2d 449, where the subject of **fertilizer** is discussed generally.

Should the term "fertilizer" as used in Title 48, Section 301(2), subsection A(3), supra, be enlarged to include the materials used in the manufacture of fertilizer or materials mixed with other materials in the processing of fertilizer, the end result of such enlargement is not on the present horizon. There is no stopping point.

I feel confident the Legislature intended no such definition of the word "fertilizer" as is suggested in your letter.

Therefore, I conclude that the word "fertilizer" as used in Title 48, Section 301(2), subsection A(3), supra, does not include the transportation of sulphuric acid to the fertilizer manufacturing plant, so as to exempt this transportation from the regulatory control of the Alabama Public Service Commission.

Very truly yours,
RICHMOND M. FLOWERS
Attorney General

April 11, 1963

Honorable Ralph P. Eagerton
Chief Examiner of Public Accounts
State of Alabama
Montgomery, Alabama

Cherokee County — DeKalb County — Winston County — Counties — Depositories — Funds — Gasoline and Gasoline Tax — Highways and Highway Department.

Proceeds received from the sale of gasoline tax anticipation warrants under the provision of local acts transferring responsibility for maintenance, construction and repair of county roads and bridges to the State Highway Department should be transferred to the State Highway Department on or before the tenth day of the month following receipt.

Opinion by Assistant Attorney General Webb.

Dear Sir:

I have received your letter of April 5, 1963 which requests my official opinion as follows:

"During the course of a recent audit, it was found that Cherokee, DeKalb and Winston Counties, which have local acts placing maintenance, construction and repair of county roads and bridges under the State Highway Department, have, with the approval of the State Highway Department, issued gasoline tax anticipation warrants. The proceeds of these warrants have been deposited in local banks with little accounting being made by the counties or the State Highway Department.

"I, therefore, request your official opinion on the following questions:

"1. Should the proceeds of gasoline tax anticipation warrants issued by these counties be paid over to the State Highway Department?

"2. May the proceeds be deposited in local banks to the credit of the counties or to the credit of the State Highway Department?"

I note that Cherokee, DeKalb and Winston Counties have transferred responsibility for maintenance, construction and repair of county roads and bridges to the State Highway Department under the provisions of the following local acts: Act No. 261, Acts of Alabama 1955, page 606,

relating to Cherokee County; Act No. 31, Acts of Alabama 1957, page 77, relating to DeKalb County; and Act No. 111, Acts of Alabama 1957, page 148, relating to Winston County.

Each of the above acts, in its pertinent parts relative to the subject of inquiry, reads the same. Under the provisions of Section 2 of each act, the counties concerned, subject to the approval of the State Highway Department, for the purpose of constructing, maintaining and repairing county roads and bridges, borrow money and issue bonds or other evidence of indebtedness. Section 1 of each act provides that the State Sighway Department shall be responsible for the construction, maintenance and repair of the county roads and bridges.

> Section 4 of each act provides, in its pertinent part, as follows: "Thereafter, on or before the tenth day of each month, the... county officials... shall pay over to the State Highway Department all funds collected or received by them as taxes, or **otherwise... from any source whatsoever**... designated or to be used for the purpose of constructing, maintaining or repairing county roads or bridges." (Emphasis supplied.)

Section 4 further provides that the State Highway Department shall maintain the funds received separately and the same shall be used by it solely for the purpose of construction, maintenance and repair of county roads and bridges in the subject county.

It is, therefore, my opinion from the above-quoted section from each of the pertinent acts that the answer to your first question is in the affirmative. The proceeds of the gasoline tax anticipation warrants should, under the provisions of Section 4 of the pertinent acts, be turned over to the State Highway Department on or before the tenth of the month following receipt.

In regard to your second question, it is my opinion that, if the proceeds are paid directly to the county for transmittal to the State Highway Department, the county may deposit the funds with a local bank designated as a county depository until the tenth of the month following receipt, or such earlier date as the county shall choose for transmittal to the State Highway Department, under the provisions of Section 4, supra. This should be done under such accounting procedures as you, as Chief Examiner, should designate. Act No. 351, Acts of Alabama 1947, page 231. However, once the funds are transmitted to the State Highway Department, I know of no authority permitting the redeposit in a local bank, and, in my opinion, such funds should thereafter be deposited by the State Highway Department with the State Treasurer in a separate fund as are other road and bridge construction and maintenance funds for the county involved, under the provisions of Section 4, supra.

Very truly yours,
RICHMOND M. FLOWERS
Attorney General

April 11, 1963

Honorable Porter Lee Hanes
Tax Assessor
Morgan County
Decatur, Alabama

Ad Valorem Taxes — Assessments

1. Where buildings and improvements are erroneously added to an assessment or realty by the Board of Equalization, or are otherwise included through error, in that they were not in existence on the "law day," October 1, at the beginning of the ad valorem tax year, the county tax assessor is authorized under Title 51, Section 57(1), Code of Alabama 1940, as Recompiled in 1958, to correct such assessment by deleting therefrom such improvements and the assessed value thereof, provided that the taxpayer makes satisfactory proof to the tax assessor that the improvements were erroneously included in the assessment for the reasons enumerated in Section 57(1), and such error is corrected on the assessment by the tax assessor prior to March 1 next after the close of the tax year.

2. The provisions of Title 51, Section 57(1), supra, are permissive in this respect and are not restrictive, as where the time specified therein has expired, such an error in the assessment can still be corrected through the "list of errors in assessments" submitted by the tax collector to the Court of County Commissioners, or court of like jurisdiction, and the State Department of Revenue under the conditions and the procedure set forth in Title 51, Sections 209 and 210, Code of Alabama 1940, and as Recompiled in 1958, and where this is done at the June term of said court following the close of the tax year involved.

3. In addition to the above remedies, and where a taxpayer has paid any ad valorem taxes through mistake because of an error in assessment, such taxpayer may file a claim for refund of such taxes, within two years from the date of payment, with the Judge of Probate of the county where paid, as is provided by Title 51, Sections 328 and 329, Code of Alabama 1940, as Recompiled in 1958.

Opinion by Assistant Attorney General Burton.

Dear Sir:

Your request for an official opinion bearing date of March 13, 1963 is as follows:

"Please give me an opinion on the following:

"'John Doe built a house after October 1, 1961. The Board of Equalization picked the house up as not being assessed and charged him with the tax for the tax year 1962. John Doe did not receive the notice that the Board of Equalization mailed to him. The Board did not know when construction was started on the house, but assumed that since it was completed in the spring that it was complete as of October 1, 1961.

"'John Doe came in to pay his tax on his lot and found that he was charged with tax on the house, too. He certified that the house was built after October 1, 1961 and that he has had no notice of the Board's action in this matter.'

"The Board is not in session and the members are off the payroll. What can I do, as Tax Assessor to arrive at a solution to such a problem?"

It is my understanding under the facts as stated by you that the building and improvements involved were not in existence or being erected on October 1, 1961, the "law day" for the tax year which began on October 1, 1961, and ended on September 30, 1962. For buildings and improvements to be subject to ad valorem taxes for a particular tax year and as a part of the realty, they must be in being, or at least partly completed, on the "law day," October 1, at the beginning of the tax year. **United States v. State of Alabama,** 213 U.S. 274, 61 S.Ct. 1011; **International Paper Company v. Curry,** 243 Ala. 228, 9 So.2d 8; Quarterly Report of Attorney General, Volume 96, page 44; Volume 76, page 58; and Volume 19, page 167.

Under the facts as stated by you then, the house to which you refer was not subject to tax as a part of the real estate for the tax year beginning October 1, 1961, and ending September 30, 1962. It was consequently an error for the Board of Equalization to have added the house to the assessment of this taxpayer's real estate for that tax year.

The Board of Equalization, however, would not have any authority to correct this error. By statute, such authority has been given primarily to the tax assessor. Where the time for the tax assessor to act in such cases has expired, then such an error can be corrected through the "list of errors in assessments" which is submitted by the tax collector to the Court of County Commissioners, or court of like jurisdiction, provided that this is done in the case to which you refer not later than the June, 1963, term of said court. See Title 51, Sections 57(1), 209, and 210, Code of Alabama 1940, as Recompiled in 1958.

Section 57(1) of Title 51, supra, provides as follows:

"When prior to March first next after the close of any ad valorem tax year, any taxpayer, his agent or attorney shall make proof satisfactory to the county tax assessor of the county in which such real estate is assessed that improvements have been assessed against him as being on said real estate when in fact there were no improvements thereon, as of the close of any ad valorem tax year **the tax assessor shall be, and he hereby is, authorized and empowered to correct said assessment to speak the truth by deleting therefrom said improvements and the assessed value thereof. The tax assessor shall promptly thereafter give written notice of such correction of said assessment to the tax collector and to the board of equalization of said county and shall securely attach a copy of said notice to the corrected assessment record.** (1953, p. 374, appvd. Aug. 6, 1953.)" [Emphasis supplied]

Under this Section, you as Tax Assessor would generally have the authority to correct this error. However, in this particular case the time for the taxpayer to make proof that the house was not a part of the real estate or in existence on October 1, 1961, and thus not subject to assessment for the tax year beginning October 1, 1961, and ending September 30, 1962, has now expired under the condition made in said statute that such proof be submitted to the tax assessor and the error corrected prior to March first next after the close of the ad valorem tax year.

Section 57(1), supra, when read in pari materia with the other provisions of the ad valorem tax laws, and particularly Sections 209 and 210 of Title 51, supra, appears to be clearly permissive and not restrictive. Therefore, even though Section 57(1), supra, would now be inoperative because of lapse of time, this taxpayer would still be able to have the error corrected through the "list of errors in assessments" which will be submitted by the tax collector to the Court of County Commissioners at the coming June term, as provided in Title 51, Sections 209 and 210, supra.

In case that the taxpayer has already paid his ad valorem taxes in this respect, then your attention is invited to Title 51, Sections 328 and 329, Code of Alabama 1940, as Recompiled in 1958, which relate to the refund of ad valorem taxes where paid through a mistake because of an error in assessment, where application therefor is made to the Judge of Probate of the county where the taxes have been paid within two years from the date of payment.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

April 16, 1963

Mr. Lawson M. Lynn
Chairman
Alabama Boxing & Wrestling Commission
762 So. Court Street
P. O. Box 1069
Montgomery 2, Alabama

Boxing & Wrestling Commission.

Wrestling matches emanating live from Alabama television studios where there is no admission charged or collected do come within the jurisdiction of the Boxing and Wrestling Commission.

Opinion by Assistant Attorney General Bradley.

Dear Sir:

Your request for an official opinion, bearing date of March 25, 1963, is as follows:

"As Chairman of the Alabama Boxing and Wrestling Commission, I have been requested to obtain an opinion from the Attorney General relative to Boxing and Wrestling matches conducted live over the Television stations in Alabama.

"Does the Alabama Boxing and Wrestling Commission, under Title 55, Section 345 of the Code of Alabama, have jurisdiction over boxing and wrestling matches conducted in the television studios of the television stations in Alabama? If so, does the question as to whether or not they charge admission fees have any bearing on this type of promotion?

"We respectfully request an early opinion since at the present time wrestling matches are being conducted in various television stations throughout Alabama."

In a subsequent telephone conversation on April 5, 1963, you stated that there was no admission charged or collected by the television studios.

In answer to the request for an opinion on whether or not the Alabama Boxing and Wrestling Commission, under Title 55, Section 345, Code of Alabama 1940, as Recompiled 1958, has control and jurisdiction over wrestling matches conducted in the television studios of Alabama television stations, and broadcast or televised over the air waves, where there is no admission fee charged or collected, I am of the opinion that the said Commission has jurisdiction over these events.

I construe the language of Title 55, Section 345, supra, to mean that the Commission has control and supervision over the stated events, regardless of whether an admission fee is charged or collected. The language clearly suggests this conclusion.

The intent of the Legislature is obviously one of regulation. It desired to regulate boxing and wrestling events conducted in Alabama, and directed the Boxing and Wrestling Commission to handle the regulation. It spelled out the functions and authorities of the Commission, and gave it the means to accomplish the supervision over the named athletic events. Refer to Title 55, Sections 348, 354, 355 and 356, Code of Alabama 1940, as Recompiled 1958.

Any other conclusion than that set out above would not be in keeping with the intent and spirit of the Legislature in enacting this regulatory measure.

A careful reading of the opinions of this office construing the 1927 Act, as amended in 1931 and 1935, and the opinions construing the 1939 Act creating the Boxing and Wrestling Commission, confirms the opinion hereinabove set out.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

April 17, 1963

Honorable Frank A. Rose, President
University of Alabama
University, Alabama

Hospitals — Funds — University of Alabama

1. A suitable addition to an existing hospital building and the proper equipment thereof is a hospital building and its equipment within the meaning of Amendment No. CXLI, Constitution of Alabama 1901, and Act No. 377, General and Local Acts 1959, page 989.

2. The Board of Trustees of the University of Alabama may in the exercise of sound judgment and discretion determine and decide what constitutes the construction of a hospital building and its proper equipment as a part of the University of Alabama Medical Center and to be used for the care and treatment of mental patients and for training medical students in the field of mental illness, as provided by Act No. 377, General and Local Acts 1959, page 989.

3. After having in good faith made the determination and decision in 2 above, the Board of Trustees of the University may expend the $3,000,000 bond money arising under Amendment No. CXLI, Constitution of Alabama 1901, and Act No. 377, General and Local Acts 1959, page 989, in executing its determination and decision and according to its plans for the construction and equipment of a hospital building for the care and treatment of mental patients and the training of medical students in this field.

Opinion by Assistant Attorney General Madison.

Dear Sir:

Your request for an official opinion bearing date of April 10, 1963 is as follows:

"On October 15, 1962, I requested the opinion of the former Attorney General as to whether the plans of the University for the construction of a proposed mental hospital including some general hospital area at a total cost of $4,204,000 fulfill the requirements of Acts 310 (constitutional amendment) and Act 377 (enabling act) of the 1959 Alabama Legislature. Discussions with representatives of your office and the State Committee of Public Health resolved the issues into the question of whether the sum of $3,000,000 would be expended for psychiatric or psychiatric supporting functions. The University was requested to explore the problem further with the State Committee of Public Health to obtain more detailed information supportive of an opinion from your office.

"As an initial step the University furnished Mr. Dean, Director, Hospital Planning Division, Department of Public Health, with revised plans of the structure and its opinions concerning the use of the surgical, radiological, admitting and emergency treatment areas of the building by mental health patients. The revised plans included conversion of one complete floor from obstetrical to psychiatric. These have been reviewed by Mr. Dean and his analysis is appended.

"The University of Alabama agrees in principle with the analysis but would emphasize the difficulties of prorating mental hospital and general hospital use in such a setting. We believe a somewhat more favorable mental health occupancy percentage is possible. If Exhibit B in Mr. Dean's analysis is referred to, it may be seen that approximately one-third of the basement area space is allocated to general hospital storage. In this connection it should be noted that the principal general hospital features of the proposed addition are radiological, surgical, and admitting and emergency treatment areas. Currently the supplies for these services are

housed in existing sections of the University Hospital complex, and we contemplate continuing them in their present locations. Under these conditions the entire basement would be available for mental health use.

"After reviewing the proposed mental health usage of the Emergency and Admissions Department on the first floor, the Radiology Department on the sixth floor, and the Surgical Department of the seventh floor, Mr. Dean has allocated them 12%, 25%, and 30%, respectively. This has been done on the basis of the data currently available.

"We would point out that to date the mental health facilities available to University Hospital patients are very limited. It has been our experience that when new and expanded facilities are created for any medical specialty the demand for them exceeds even our most optimistic estimations. At present the University is recruiting staff and developing training programs in the various professional groups associated with the diagnosis and treatment of mental health. We believe this could result in as much as 20%, 35%, and 40% use of the first, sixth, and seventh floors, respectively, by patients with mental health problems. If this occurred, the over-all total space in the new construction attributable to mental health would be in excess of 70%.

"We would also call to your attention the investments being made by the University Hospital as necessary preliminary or concurrent projects to the successful development of the Psychiatric Addition. These include the land on which the building will be located, the vacating of that land by removal of the present function to another site, and the expansion of Hospital services that will support the Psychiatric Wing such as the Clinical Laboratories, the Medical Records Department, the Dietetic Department, and Hospital Cafeteria.

"The relocation of the present Outpatient Clinic function in the most suitable building location for the Psychiatric Wing will cost approximately $800,000. The University Hospital is planning on increasing its Clinical Services, and approximately $250,000 of these expenses could be thought of as support for the Psychiatric Addition. An enlargement of University Hospital kitchen and central cafeteria to accomodate the Psychiatric Addition and other expansions will cost approximately $250,000. The sum of the latter three activities plus $2,608,582 (the 62.05% estimated by Mr. Dean as the psychiatric or psychiatric supporting of a project cost of $4,204,000) would total as follows:

"1. 62.05% of $4,204,000 estimated total construction for Psychiatric Wing with 62.05% being the

tentative allocation to mental health (See Mr. Dean's report of March 19, 1963)	$2,608,582
2. Relocation of Outpatient Clinic function to clear land site for Psychiatric Addition	800,000
3. Enlargement of Clinical Services in support of Psychiatric Addition	250,000
4. Enlargement of main kitchen and main cafeteria in anticipation of Psychiatric Addition	250,000
	$3,908,582

"There are other expenditures involved in preparation for the Psychiatric Addition which have not been emphasized but should be recorded. The preliminary architectural master plan work in connection with the Psychiatric Addition and related projects and the time of University of Alabama Medical Center officials in the planning and programming has not been estimated. Nor have other costs such as the expansion of library acquisitions, the space allocation in the Health Research Facilities Building for basic science research in psychiatry and similar indirect expenses been considered.

"Finally, no attempt has been made to estimate all of the facilities of the existing University Hospital that will support the Psychiatric Addition (for example, the morgue, since some psychiatric patients die in the hospital and this area is necessary in these circumstances). Similarly, the Electrocardiography Laboratory, the Cystocopy Laboratory, the Artificial Kidney Laboratory, the Inhalation Therapy Laboratory serve the psychiatric patients and would have to be duplicated or their immediate potential would be lost to a Psychiatric facility that did not function as an integral part of the existing University Hospital. Duplication of these services, as well as administrative departments, would add significant construction costs if the Psychiatric Addition were built as a separate hospital apart from the existing University Hospital complex.

"We trust the foregoing information is helpful. We would be available to meet with you or your associates and further explore this subject if you deem it advisable."

Amendment No. CXLI, Constitution of Alabama 1901, was proclaimed ratified February 26, 1960.

The amendment authorized the State of Alabama to become indebted and to issue interest bearing bonds in the principal amount of not exceeding $3,000,000.

It provided that the bond proceeds after expenses of sale, etc., shall be used solely for the construction and equipment of a hospital building to constitute a part of the University of Alabama Medical Center, and to be used for the care and treatment of mental patients and for training of medical students in the field of mental illness.

Appropriate enabling legislation appears by Act No. 377, General and Local Acts 1959, page 989. This act provides in Section 6 the following as to the bond proceeds:

> "...The balance remaining shall be disbursed from time to time on order of the Board of Trustees of the University of Alabama solely for the construction and equipment of a hospital building to constitute a part of the University of Alabama Medical Center and to be used for the care and treatment of mental patients and for training medical students in the field of mental illness."

In an opinion of this office to you under date April 21, 1961, it was ruled that there was no material distinction between the construction of a new addition to existing hospital facilities and the construction of a separate building distict therefrom. It was pointed out also that it appeared far more economical to include the addition as a part of existing facilities.

The reasoning of that opinion is still applicable as to the present plan now submitted to me, and so long as the bond proceeds are used for hospital building and equipment purposes to be used in the care and treatment of mental patients and for training medical students in the field of mental illness, I see no legal objection thereto.

The University Hospital and related facilities are staffed with experts in the medical field. In determining that which is proper in the care and treatment of mental patients and for training medical students in this field and the facilities and equipment necessary therefor, much is left to the sound judgment and discretion of the Board of Trustees of the University. In the absence of evidence of gross abuse or fraud in the exercise of this judgment and discretion, courts will not interfere.

Common knowledge leads me to say that a person in need of mental treatment may have trouble with his eyes, or his teeth, or may have appendicitis, necessitating an operation. The treatment of mental patients may sometimes and in some cases also require services which might, if not forming a part of the treatment for the mental patient, be those performed by a surgeon or a practitioner in the treatment of ordinary every day patients.

This office does not know, however, and is not in position to say, what does or does not, as a conclusive determination, constitute proper

facilities and equipment for the care and treatment of mental patients or the proper training of medical students in this field.

From the facts presented to me, it appears that the plan has the good faith approval of the governing authorities of the University and of its medical experts. Other medical opinions, including in large degree that of the State Director, Hospital Planning Division, Department of Public Health, do not militate against the plan.

It appears further from the facts submitted that when completed more than $3,000,000 will have been expended, including the bond proceeds, for hospital facilities and equipment germane to and to be used in the care and treatment of mental patients and for training medical students in the field of mental illness.

In accordance with what has been said above, and based upon the premises stated, I approve as legal the plan submitted and the expenditure of the bond funds in accordance therewith.

Yours very truly,
RICHMOND M. FLOWERS
Attorney General

April 23, 1963

Honorable H. M. Gilley, Jr.
Clerk, Circuit Court
Marshall County
Guntersville, Alabama

Marshall County — Clerks of Circuit Courts — Clerks of County Courts — Cost and Fees — Solicitors.

1. Where defendant enters on actual trial of cause and testimony is taken and thereafter enters a plea of guilty, the Circuit Clerk, Ex-Officio Inferior Court Clerk, is entitled to a fee of $7.50 for trial. Act No. 741, Acts of Alabama 1957, page 1170.

2. The Solicitors' Fee should be taxed as cost on plea of guilt except as limited by local act and Title 11, Section 81, Code of Alabama, Recompiled 1958.

Opinion by Assistant Attorney General Webb.

Dear Mr. Gilley:

I have received your letter of April 4, 1963 in which you request

my official opinion as follows:

"As Clerk of the Circuit Court of Marshall County, I am ex-officio clerk of the County Court of Marshall County. I should very much appreciate your opinion as to the following questions connected with the duties of my office:

"1. In a misdemeanor case originating by affidavit where the defendant, after trial has commenced and at least some testimony has been taken, pleads guilty, is a Circuit Clerk as ex-officio clerk of a County Court entitled to a fee of $7.50 or a fee of $5.00?

"2. In a misdemeanor case in County Court, should a defendant be taxed with a Solicitor's fee where the defendant enters a plea of guilt prior to a trial?"

I note that the County Court of Marshall County is established under the provisions of Act No. 346, Acts of Alabama 1955, page 786, and that you, as Circuit Clerk, serve as Ex-Officio Clerk of the County Court. The provisions of Act No. 346, supra, are similar to those of acts creating other county and inferior courts throughout the state and the subject of your inquiry is equally applicable to these other courts.

In regard to your first question, Title 11, Section 89(2), Code of Alabama Recompiled 1958 (Act No. 741, Acts of Alabama 1957, page 1170), provides, in its schedule of fees for ex-officio clerks, in pertinent part as follows:

"For each misdemeanor case originating by affidavit when the defendant **pleads guilty** $5.00

"For each misdemeanor case originating by affidavit when the defendant **is tried** ..... 7.50"

[Emphasis supplied]

Normally the world "trial" includes within its meaning a plea of guilt and action of the court thereon. See Quarterly Report of Attorney General, Volume 18, page 161(163). However, in the passage of Act No. 741, supra, the Legislature obviously intended something more than a mere plea of guilt to entitle the clerk to a $7.50 fee. This office, in Quarterly Report of Attorney General, Volume 103, page 11(20), ruled that the emphasis in the clerk's fees placed by the Legislature in this enactment was that of trial and the duties performed in relation thereto by the clerk not the charge or conviction. The question at issue in this opinion was whether the clerk received fees for felony or misdemeanor cases when a defendant began trial on a felony and

later was convicted of a misdemeanor. Applying this same legislative intent and reasoning behind this ruling to the wording quoted above from Act No. 741, supra, I am of the opinion that you are entitled to receive the fee of $7.50 for trial of the defendant rather than the lesser fee of $5.00 for his plea of guilt. In my opinion, such was the intent of the Legislature by separating the two fees and making each distinctive, and it is further my opinion that the Legislature intended to compensate the clerk by an additional $2.50 for the services connected with the actual performance of a trial of a case. I feel constrained, however, to point out that the order of the court should properly reflect that trial was commenced and testimony taken prior to the defendant's plea of guilt being entered to justify collection of the larger amount.

With regard to your second question, I find that, under the provisions of Section 9 of Act No. 346, supra, the same solicitor's fees as provided in other courts shall be collected in your court, with the exception of violation of rules of the road, use of motor vehicles on the public highways, and the game and fish laws when a plea of guilt is entered. I note also that Title 11, Section 81, Code of Alabama Recompiled 1958 (Act No. 472, Acts of Alabama 1951, page 835), provides that, except in counties of four hundred thousand (400,000) population or more, solicitors' fees shall not be taxed in cases brought in county, inferior courts and before justices of the peace, under Titles 23 and 36 of the Code, if the defendant pleads guilty and no appeal is taken.

In this regard, first it should be noted that, except for the specific statutory exemptions of solicitors' fees, the mere fact that the defendant pleads guilty does not exempt him from payment of his fees otherwise taxed by law. See **Richards v. State**, 29 Ala. App. 17, 190 So. 421.

The question thus presented involves the definition of the phrase "rules of the road or legal and reasonable rules or regulations governing the use of motor vehicles upon the public highways" as the same is used in Section 9 of Act No. 346, supra. In this regard, I have carefully reviewed the crimes designated under the provisions of Titles 23 and 36 of the Code of Alabama 1940 as the same is amended and, in my opinion, Section 9, supra, applies only to those crimes enumerated under Title 36 and not to those enumerated under the provisions of Title 23. It also applies, of course, to all game and fish law violations. The crimes enumerated under Title 23 are for the primary purpose of protecting the traveling public by guarding against unsafe conditions in the construction, reconstruction and maintenance of the public roads. It further seeks to guard against missiles and debris and other dangerous objects being thrown or placed on or above the public roads so as to put the road in a dangerous condition. Title 36, on the other hand, seeks to protect the traveling public by regulating the operation of motor vehicles. The term "rules of the road" is used in numerous instances in the provisions of Title 36.

It is, therefore, my opinion that you, as Clerk, should tax solicitors' fees in all cases wherein a plea of guilt is entered except: (1) Where the defendant plads guilty to a violation of the laws designated in Title 23 and takes no appeal, Title 11, Section 81, supra; and (2) where the defendant pleads guilty to a violation of the laws designated in Title 36 or to the game and fish laws. Section 9, Act No. 346, supra.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

April 24, 1963

Hon. R. M. Courington
Superintendent
Russellville City Schools
Russellville, Alabama

Schools — Three Mill School Tax — Elections — Municipalities.

1. It is permissible to hold a county-wide three mill school tax and district three mill tax simultaneously, and same election officials may hold both elections.

2. When city limits are expanded so as to take in new and additional territory in cities having a city board of education, the city school district is automatically expanded to coincide with the new city boundaries.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of April 9, 1963, is as follows:

"I am writing you for an opinion on holding an election in Franklin County and the City of Russellville for the purpose of renewing school ad valorem taxes, the county 3-mill and the district 3-mill, authorized by Article 7, Section 254-274, Title 52, Code of Alabama 1940. "The question I have in mind is as follows: Is it possible in one election to vote on the county 3-mill and the district 3-mill simultaneously? On the ballot, proposition No. 1 would pertain to the county 3, proposition No. 2, 3 and 4 would pertain to the school districts within the county. I understand, of course, that the results of the district 3 would be void if the county 3 received a

negative vote. The sole purpose is to eliminate the expense of two separate elections.

"A second question I have pertains to school boundaries. If the city limits of Russellville were expanded, would the Russellville City School boundaries be expanded automatically so as to coincide with the city boundaries?"

My answer to your first question is in the affirmative.

The Supreme Court of the State of Alabama in the case of **Brittain v. Benefield,** 263 Ala. 171, 81 So. 2d 667, had an opportunity to consider the holding of a three mill and a one mill school tax election on one and the same day. The Court observed that the two taxes made up a single comprehensive plan for the continued financing of the public schools in the county, and held that the election could properly be submitted as a unit. I see no legal difference in the situation which was presented in the **Brittain** case and the one presented by you.

You are, therefore, advised that the county-wide three mill school tax and the district school tax may be submitted at one and the same election. You, of course, understand that the district three mill tax can never extend beyond the time voted for the county-wide three mill tax. Title 52, Section 255, Code of Alabama 1940.

My answer to your second question is also in the affirmative.

Under the provisions of Title 52, Section 263, Code of Alabama 1940, any city having a city board of education shall constitute an independent school tax district. This being true, it is my opinion that when the city limits of any such city are expanded, this automatically expands the school district so as to coincide with the new city boundaries. Other provisions of the law provide for tax adjustments, etc. and distribution in such cases.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

April 25, 1963

Honorable R. L. Jones
Member, House of Representatives
Monroe County
Monroeville, Alabama

Appropriations — County Boards of Education — Funds — Municipalities — Schools.

A municipality may appropriate funds which are earmarked for school purposes to a county high school located within its corporate limits to purchase band uniforms provided that title to said uniforms shall remain in the school.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion, dated April 18, 1963, is as follows:

"I have been requested by the City Council of Frisco City, Alabama, to obtain from you an official opinion on the following matter:

"Frisco City levies a three mill ad valorem property tax 'to be used exclusively **for school purposes** and to be expended by the Town Council **upon budgets submitted** by the school officials.'

"The high school band is badly in need of new uniforms and the school principal has included in the budget submitted by him to the Town an amount to be used for purchasing band uniforms.

"Can the Town Council of Frisco City lawfully appropriate funds out of the three mill tax receipts of the town for the purchase of band uniforms, under these facts?"

You have informed us that the high school to which your request refers is located within the corporate limits of the Town of Frisco City and is operated by the County Board of Education.

In an opinion reported in Quarterly Report of Attorney General, Vol. 57, page 85, this office held that a county board of education may expend school funds for the purchase of uniforms for a school band if such uniforms are to be owned by the school and not by the individual members of the band.

The Supreme Court of Alabama, in the case of **Carey v. City of**

Haleyville, 230 Ala. 401, 161 So. 496, held that the governing body of a municipality has authority to expend public money in support of the public schools of the municipality even though title to the school buildings and lands is vested in the county board of education rather than in the municipality.

Therefore, I am of the opinion that a municipality may appropriate funds which are earmarked for school purposes to a county high school located within its corporate limits, such funds to be used to purchase uniforms for the high school band, provided that title to said uniforms shall remain in the school. Cf. Quarterly Reports of Attorney General, Vol. 100, page 39; Vol. 54, page 5; Vol. 52, page 141; and Vol. 26, page 15.

Premises considered, you are advised that the Town of Frisco City may make the appropriation contemplated by your request.

Very truly yours,

RICHMOND M. FLOWERS
Assistant Attorney General

Hon. George Bellsnyder
Chairman
Board of Registrars
Jefferson County
Birmingham, Alabama

Absentee Ballots — Elections.

1. Any registered voter may apply to the Board of Registrars at any time before the first day of March of any given year for the purpose of having his name placed on the absentee ballot list.

2. A person whose name is on the absentee ballot list can vote at any election held after his name is put on the list.

3. Procedure for removing absentee voters from regular poll lists discussed.

4. Congressmen and other governmental employees who live outside their county of residence are eligible to register as absentee voters.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of April 15, 1963, is as follows:

"Relative to Act 655 S. 53 Regular Session 1959 which controls absentee voting in this county

"Will you be kind enough to ascertain for me from the Attorney General of the State of Alabama a clarification of the following questions that have arisen relative to this law?

"1. When may a voter apply requesting his name be placed upon the absentee voters list?

"2. When a voter applies to vote an absentee ballot, when will they be eligible to vote such a ballot?

"3. When a person requests his name be placed upon the absentee voters list, is his name immediately removed from the regular voters list when he becomes an absentee voter?

"4. How does this law apply to a congressman, and other governmental employees who live in Jefferson County, but who are regularly out of this county on election days, and wish to vote an absentee ballot?

"These questions arise frequently, and are asked not only by those involved, but by others who would like a clearer interpretation of this statute."

The answer to your first two inquiries is found in Section 2(b) of Act No. 655, General Acts 1959, Special Session, Page 1585, as follows:

"... Such elector shall present himself to the board of registrars of his county at any time before March 1, 1960 or any subsequent year, at any regular or special meeting thereof for the purpose of having the board of registrars place his name on the list of qualified electors eligible to vote an absentee ballot in any primary, general, special, or municipal election held thereafter...."

It appears from the above quotation and its context that any qualified elector may appear before the board of registrars at either a regular or special meeting any time before the first day of March of any given year, and if such person is found by the board of registrars to qualify as an absentee voter under the provisions of Act No. 655, supra, and his name is placed on the absentee ballot list, he may vote at any election primary, general, special, or municipal, thereafter held.

The board of registrars has no duty or responsibility in removing a person who becomes an absentee voter from the list of registered voters. The only duty to be performed by the board of registrars under the provisions of the above act is to determine whether or not any given voter meets the requirements to become an absente voter, prepare a list of such persons who have become qualified absentee voters, and file the list with the probate judge of their county and with the secretary of state not later than March 15, of each year.

Subsection (e) of Act No. 655, supra, provides the method of removing qualified absentee voters from the official list of qualified electors. This duty is placed upon the election officials as provided in said Subsection (e).

In my opinion, a congressman or other governmental employee who lives in Jefferson County and desires to apply to become an absentee voter may do so. Certain it is, their regular business or occupation and the performance of their duties require that they be absent from the State on election days, and if they desire their names to be placed on the absentee ballot list, they qualify under the provisions of Act No. 655, supra.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

May 2, 1963

Hon. Conrad M. Fowler
Judge of Probate
Shelby County
Columbiana, Alabama

Counties — Sheriffs — Opinions Overruled, Modified or Distinguished

1. The county governing body in its discretion may pay the expenses of deputy sheriffs in attendance at school for law enforcement officers conducted by the State Department of Public Safety.

2. Opinion appearing in Quarterly Report of Attorney General, Vol. 47, page 170, is hereby overruled.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of April 24, 1963,

is as follows:

"A request has been made of the County Board of Revenue and Control of Shelby County by the Honorable C. P. Walker, Sheriff of Shelby County, for an allowance to pay the expenses of a Shelby County deputy sheriff in attendance at the school for law enforcement officials conducted by the State Department of Public Safety in Montgomery. The sum of $150.00 has been requested for this purpose. In view of an opinion of the Attorney General of Alabama dated June 26, 1947 and found on Page 170 of Volume 47 of the quarterly report of the Attorney General of Alabama, our County Board had some question as to the legality of the payment of this expense from public money.

"The Shelby County Board of Revenue and Control was created by Act No. 179 of the regular session of 1949 of the Legislature of Alabama. This Act is found on Page 206 of the **Acts of Alabama** of 1949.

"May the Shelby County Board of Revenue legally pay the expenses of the Deputy Sheriff in attendance at the school for law enforcement officials?"

My answer to your inquiry is in the affirmative.

Section 1 of Act No. 593, General Acts 1949, page 925, reads as follows:

"Section 1. That the county governing body of each of the several counties of the State may, in its discretion, and upon application of the sheriff of the County, purchase for the use of the sheriff any equipment or supplies and pay for any services performed for the sheriff which are reasonably necessary for the suppression of crime, the apprehension of criminals, or the proper performance of the sheriff's duties."

It appears from the above-quoted section of Act No. 593, supra, that the county governing body may, in its discretion when requested so to do by the sheriff, pay for any services performed for the sheriff which are resonably necessary for the suppression of crime, the apprehension of criminals, or the proper performance of the sheriff's duties.

It appears from your letter that the Sheriff of Shelby County requested the governing body of your county to pay the expenses of one of his deputies to attend the Alabama Police Academy held in Montgomery, Alabama. This request was made by the sheriff prior to the deputy's attending the school.

In my opinion, the attendance of this deputy upon the school is a service performed for the sheriff, which is reasonably necessary for the suppression of crime, the apprehension of criminals, or the proper performance of the sheriff's duties, and, therefore, comes within the purview of Act No. 593, supra. Therefore, the county governing body may, in its discretion, authorize the expenditure of $150.00 for this purpose, and if authorized the expenditure will be legal under the provisions of Act No. 593, supra.

The opinion referred to in your request appearing in Quarterly Report of Attorney General, Vol. 47, page 170, was written prior to the passage of Act No. 925, supra, and since said opinion reaches the conclusion different from that hereinabove, the same is hereby overruled and withdrawn.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

May 6, 1963

Honorable Arthur J. Hanes
President, City Commission
City of Birmingham
Birmingham, Alabama

Corporations — Municipalities — Officers and Offices.

The City of Birmingham and its Water Works Board may deal with an incorporated firm which has as one of its officers and stockholders a member of said Water Works Board.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an opinion, under date of April 12, 1963, reads as follows:

"I respectfully request your opinion as to the validity and effect of the appointment of a member of The Water Works Board of the City of Birmingham, organized under Section 394, et seq., Title 37, of the Code of Alabama 1940, in view of possible conflict of interests. The member in consideration is an officer in and a stockholder of, owning a small fraction of outstanding common stock in a corporation which has an outstanding group insurance

contract in force with such Water Works Board, covering its employees, and also an outstanding insurance group contract in force with the City of Birmingham, covering its employees, both of profit or financial benefit to such corporation. Other group insurance contracts with the City and its various Boards may be entered into in the future.

"Specifically, is the appointment of such member prohibited by the provisions of Title 37, Section 414, Code of Alabama 1940, or by Act No. 60, Special Session of the Alabama Legislature 1962, approved July 2, 1962, or by any other statute or law, and are any of said group insurance contracts rendered void or voidable by virtue of such provisions of statute or law in consequence of such appointment?

"In this connection, your attention is called to prior opinions of the Attorney General of Alabama on the question of conflict of interests which may or may not be affected by more recent legislation: Opinion under date of February 24, 1961, Quarterly Report of Attorney General, Vol. 102, page 15; Opinion under date of October 26, 1961 to Hon. A. J. Coleman, City Attorney, City of Decatur, and opinion under date of February 2, 1962 to J. M. Breckenridge, City Attorney of Birmingham, Alabama."

Act No. 60, Acts of Alabama 1962, page 76, is the statute which is applicable to members of the Water Works Board of the City of Birmingham, in the field of conflict of interests of such members. See Sections 1 and 4 of said Act.

Section 2 of Act No. 60, reads in part as follows:

"(a) . . . No member of a board shall be directly or indirectly interested in any work, business or contract, the expense, price or consideration of which is paid from the funds over which the board has jurisdiction or which the board administers; and no member of the board shall be directly or indirectly interested in furnishing any work, materials, supplies, services or anything which is the subject of a contract made by the board.

"(b) Membership on a board shall not result in it being unlawful for a member of the board to be interested in any work for, or business or contract with the city, provided the said board does not authorize the said work, business or contract."

This office has held that an incorporated municipal utility board is a subdivision of the municipality and the members of such a board are municipal officers. Quarterly Report of Attorney General, Vol. 102, page 15. However, we have also held, in construing statutes similar to Act No. 60, supra, that such statutes do not prevent a municipality

from dealing with incorporated firms which have as their officers or stockholders officials of the municipality. See Quarterly Report of Attorney General, Vol. 56, page 108 and authorities there cited.

Therefore, I am of the opinion that the appointment of the member of the Water Works Board of the City of Birmingham to which your request refers is not prohibited by any statute or principle of law. I am further of the opinion that such appointment has no effect upon the validity of any of the group insurance contracts mentioned in your request.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

May 7, 1963

Miss Christine P. Reynolds
Register in Equity
Circuit Court of Tuscaloosa County
Tuscaloosa, Alabama

Insane Persons.

Under Title 21, Section 99, Code of Alabama 1940, as amended, funds in this State of a person of unsound mind, who is confined in a hospital under the jurisdiction of the Department of Mental Hygiene of the State of New York, may be paid to the Director of such hospital where such Director has been issued a Certificate of Authority to receive money or other personal property of a patient in an amount or value not to exceed $2500, as provided by the laws of the State of New York.

Opinion by Assistant Attorney General Hall.

Dear Miss Reynolds:

Your letter of April 22, 1963, requesting an opinion of this office is as follows:

"As Register of the Circuit Court of Tuscaloosa County, Alabama, I have on hand $277.43, arising out of the sale of lands in Tuscaloosa County, Alabama, which belongs to a non compos mentis in the Middletown State Hospital for mental patients, located at Middletown, New York. This Middletown State Hospital for the

insane has insisted that I remit this $277.43 to them under the attached Certificate.

"I have written them the following, to-wit:

"Where insane parties have no Guardian, Section 99 of Title 21, of the Code of Alabama, as amended by Alabama Act 821 of 1961, reads as follows:

" 'The funds of a minor or person of unsound mind, not having a general guardian, not exceeding in amount fifteen hundred dollars, may be paid to the judge of probate of the county in which said minor or person of unsound mind resides, if a resident of the state, or if a nonresident, to the judge of probate or like officer of the county in which the debtor or creditor resides; and the person from whom said sum is due may discharge himself by making such payment.

" 'I am not a lawyer and could not act as such for you if I were. All I can do is report the facts to you and pay out the money, if and when the law is complied with.'

"I have tried to make it plain that the law only says I can pay the money to the Probate Judge or like officer of the county where the non compos mentis resides and that the mental hospital of the state of New York is not an Office or Institution I can pay the money to.

"This Middletown State Hospital for the Insane of Middletown, New York, is insisting with all vigor that I pay this $277.43 to them.

"I will appreciate it if you will advise me what I shall do."

Section 1356, New York Civil Practice Act, provides:

"The jurisdiction of the supreme court [same as our Circuit Court] extends to the custody of the person and the care of the property of a person incompetent to manage himself or his affairs in consequence of lunacy, idiocy, habitual drunkenness, or imbecility arising from old age or loss of memory and understanding or other cause. Where a county court has jurisdiction of those matters, concurrent with that of the supreme court, the jurisdiction of the court first exercising it, as prescribed in this article, is exclusive of that of the others with respect to any matter within its jurisdiction for which provision is made in this article."

You will note that the provisions of Subdivision 14, of Section 34,

of the New York Mental Hygiene Law, which is quoted as footnote to the copy of the Certificate of Authority enclosed with your letter provides that "Notwithstanding the provisions of section thirteen hundred and fifty-six of the civil practice act, providing for jurisdiction over the person and property of an incompetent, the commissioner may authorize directors of state institutions in the department to receive or obtain funds or other personal property excepting jewelry due or belonging to a patient who has no committee, up to an amount or value not exceeding $2500, without taking proceedings for the appointment of a committee;..."

I have examined the New York Mental Hygiene law and find that Section 26 thereof authorizes the Commissioner of the Department of Mental Hygiene to delegate his powers and duties to employees within the Department.

Title 14, Part 5, Section 5.2, of Official Compilation of Codes, Rules, and Regulations of the State of New York reads:

> "The Commissioner of the Department of Mental Hygiene delegates and assigns his powers and duties pursuant to subdivision 14 of section 34 of the Mental Hygiene Law in the execution of certificates of authority granted to directors of State hospitals to Daniel J. Shea, secretary of the Department of Mental Hygiene."

I note that the copy of the Certificate of Authority which was enclosed with your letter is signed by D. J. Shea, Secretary.

In an opinion contained in the 1943 opinions of the Attorney General of New York, page 326, the Attorney General of that State ruled that a superintendent has, under Subdivision 14 of Section 34 of the Mental Hygiene Law of New York, the right to temporary custody of furniture and other personal effects of inmates in institutions for whom no committee of the property has been appointed, and whether he shall exercise his authority in a particular case is for his own best judgment.

In the case of **Re Arnold,** 203 N.Y. Supp. 2d 335 (1960), the Supreme Court of New York for Queens County held that Subdivision 14 was intended to obviate the necessity for appointment of a committee for an incompetent where funds or personal property, excepting jewelry, were due or belonging to a patient in a State institution.

Therefore, it is my opinion that in view of the above cited provisions of the New York law, the Director of the Middletown State Hospital is a "...like officer of the county in which the debtor or creditor resides;..." within the meaning of the provisions of Title 21, Section 99, Code of Alabama 1940, as amended, and that you may discharge yourself by making payment of the funds belonging to the

incompetent to such Director, who is required by the New York law to give you a receipt therefor.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

May 7, 1963

Honorable Nelson Allen
Judge of Probate
Walker County
Jasper, Alabama

Taxation — Filing Tax — Mineral Documentary Tax

Provisions of Act No. 261, General Acts 1957, page 332, as amended by Act No. 864, General Acts 1961, page 1346, dealing with mineral documentary tax, discussed generally.

Opinion by Assistant Attorney General Livingston.

Dear Sir:

Your request for an official opinion bearing date of May 15, 1963, is as follows:

"Will you please examine the enclosed deed (Photo Copy) and advise me if the Mineral Tax applies and is due to be collected on each of:

½ interest, 1900 acres

½ interest, 9000 acres

⅛ interest, 2725 acres

"It appears that the Mineral Tax applying would amount to $2,043.75."

The deed attached to your inquiry makes the following conveyances:

"An undivided one-half (½) interest in and to the minerals and mining rights; except the gas, oil and sulphur; in approximately 3800 acres of land situated in Walker County, Alabama, as described in Exhibit "A" attached hereto and made a part hereof; and also

"An undivided one-half (½) interest in and to the minerals and mining rights; except the gas, oil and sulphur; in approximately 18,000 acres situated in Cullman County, Alabama, as described in Exhibit "B" attached hereto and made a part hereof; and also, "An undivided one-eighth (⅛) interest in and to the gas, oil and sulphur in the said lands as above and hereinafter in Exhibits A and B described, together with all rights and privileges therein and thereto; and also

"All and singular the tenements and appurtenances unto all of the foregoing belonging or in anywise appertaining."

The pertinent sections of Act No. 261, General Acts 1957, Volume 1, page 332, as amended by Act No. 864, General Acts 1961, page 1346, which levies the mineral documentary tax, are as follows:

"Section 2. There is hereby levied and shall be paid and collected as herein set forth a documentary or transfer tax (to be known as the mineral documentary tax) upon the filing and recording of every lease and other writing hereafter executed whereby there is created a leasehold interest in and to any non-producing oil, gas or other minerals in, on or under or that may be produced from any lands situated within the State of Alabama, or whereby any such interest is assigned or is extended beyond the primary term fixed by the original instrument, and upon every deed, instrument, transfer, evidence of sale or other writing whereby there is hereafter conveyed to a grantee or purchaser, or excepted or reserved to a grantor **separately and apart from the surface** any interest in or right to receive royalty from any non-producing oil, gas or other minerals in, on or under or that may be produced from any lands within the State of Alabama. Provided the tax shall not apply to any mortgage or instrument creating a lien upon such interest, nor to the sale under foreclosure thereof." (Emphasis added)

"Section 5. Such tax shall be paid to the **probate judge of the county in which the land affected** by the sale, lease or reservation or other instrument of such oil, gas or other minerals **is situated,** and the said judge shall stamp or write the name of the county and the amount of tax paid on the face of the instrument when filed for recording and shall show upon the face or margin of the record thereof the amount of tax paid." (Emphasis added)

Under Section 2, supra, for a deed to be subject to the mineral documentary tax, it is necessary that the non-producing oil and gas interest in land be either conveyed to a grantee or purchaser or excepted or reserved to a grantor separately and apart from the surface.

It is apparent from the wording of the first two conveyances (the

mineral interest in 3800 acres in Walker County and 1800 acres in Cullman County) that the oil and gas interest excepted is not excepted to the grantor separately and apart from the surface. Insofar as these two conveyances are concerned, the grantor still owns the surface of the land referred to and the oil and gas interest in such land. It is, therefore, my opinion that the mineral documentary tax is not due with respect to the oil and gas interest excepted in these two conveyances.

However, this is not true with respect to the third conveyance. Here, an undivided ⅛ interest in and to the gas, oil and sulphur in all the lands affected by the first two conveyances is conveyed to the grantee separately and apart from the surface of the land. It is, therefore, my opinion that the mineral documentary tax is due with respect to this conveyance of the ⅛ interest in and to the oil and gas in the lands referred to.

It is noted that the 3800 acres referred to in the first conveyance is located in Walker County and the 18,000 acres referred to in the second conveyance is located in Cullman County. Section 5, supra, provides that the tax is paid to the probate judge of the county **in which the land affected is situated.**

It is, therefore, my opinion that documentary tax should be paid to you as Probate Judge of Walker County when the deed in question is filed in your office, the tax to be computed on the basis of the number of mineral acres in Walker County (⅛ of 3800 acres at 15c per acre), and documentary tax should be paid to the Probate Judge of Cullman County when the deed in question is filed in Cullman County, the tax to be computed on the basis of the number of mineral acres in Cullman County (⅛ of 18,000 acres at 15c per acre). See Quarterly Report of Attorney General, Volume 93, page 41.

Yours truly,

RICHMOND M. FLOWERS
Attorney General

May 9, 1963

Honorable Jack Huddleston, Attorney
Colbert County Hospital Board
315 Nashville Avenue
Sheffield, Alabama

Hospitals — Insurance

1. The directors of the Colbert County Hospital Board, incorporated under the provisions of Article 5, Subdivision 1, Title 22, Code of Alabama 1940, as amended, may not participate in group hospital insurance benefits available

to employees of the hospital wherein the hospital and the employees both participate in payment of the premiums.

Opinion by Assistant Attorney General Madison.

Dear Sir:

Your request for an official opinion bearing date of May 7, 1963 is as follows:

"I represent the Colbert County Hospital Board, Sheffield, Alabama, duly incorporated under the provisions of Article 5, Subdivision 1, Title 22 of the Code of Alabama, 1940, as amended.

"The Board of Directors have propounded a question to me relative to the one sentence in Section 204(23) of said Title, relating to compensation of the Directors. The section says in part as follows, 'The members of the board of directors shall serve without compensation, except that they may be reimbursed for actual expenses incurred in the performance of their duties as directors.'

"Their question is, 'Can the Board of Directors, or can each member of the Board of Directors take advantage of the group hospital insurance benefits available to employees of the hospital, wherein the hospital and the employees both participate in payment of the premiums, without violating the above quoted provision'?

"Will you please advise me in this matter?"

It may be doubted at the outset that a member of the Board of Directors of the Colbert County Hospital Board, incorporated under Article 5, Subdivision 1, Title 22, Code of Alabama 1940, as amended, is an officer or employee within the provisions of Act No. 925, General and Local Acts 1961, page 1484.

Act No. 925, supra, is the act which authorizes the group hospital insurance. It refers, however, to officers and employees who have authorized in writing the deductions **from their compensation** to pay the premiums on such insurance whether payable in whole or part by such officer or employee. See also Section 349, Title 28, Code of Alabama 1940.

In addition, the payment of portions of the insurance premium is in the nature of an increase in compensation. **Opinion by the Justices,** 249 Ala. 88, 30 So.2d 14.

Since the law provides that the directors shall serve without

compensation, it is my opinion for the reason stated that your question should be answered in the negative.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

May 10, 1963

Honorable Bradley Brown, Director
Department of Revenue
117 Court House
Birmingham 3, Alabama

Checks — Licenses — Motor Vehicles — Judges of Probate — Commissioner of Licenses.

1. Official charged with the responsibility of issuing business licenses and automobile license tags, who accepts checks in payment therefor which checks are subsequently dishonored by the bank upon which they were drawn, is estopped to deny his liability to the state, county, or city for the amount of money due each respectively.
2. The mere issuance of a license is only evidence of payment and when a party gives a worthless check there has been no payment in contemplation of law and proper proceedings may be instituted, either civilly or criminally, against the party operating or functioning under said purported license.

Opinion by Assistant Attorney General Screws.

Dear Sir:

This is to acknowledge receipt of your letter of May 1, 1963, together with enclosures of other letters, relative to the liability and duties of an official charged with the responsibility of issuing business licenses and automobile license tags, who accepts checks in payment therefor which checks are subsequently dishonored by the bank upon which they were drawn.

The general rule appears to be that in a settlement of official accounts, the receipt by an officer of checks or other evidence of debts is treated as the receipt of money for which the officer is liable.—67 C.J.S. 415, Officers — §122. See **Parks et al. v. Bryant et al.**, 142 Ala. 627, 38 So. 180.

In an opinion of this office reported in Biennial Report of Attorney General 1928-30, page 687, it was held that when probate judge accepts check as payment of license tax due state, county, or city and issues a license, he is estopped from denying his liability to the state, county, or city for the amount of money due each on issuing such licenses. In said opinion, it was observed:

> "In reply to your inquiry will say that the Judge of Probate has no authority to issue such receipts and tags except upon receipt of the amount of money required by the statute. When he has issued such receipt and tag, he is estopped, so far as State, County or City is concerned, from denying that he has received such money and he is bound to account to each such government for its share of such amount.
>
> "As between the tax collector and the person whose check he has accepted as money, a different rule necessarily obtains. No one can take advantage of his own wrong. The Judge of Probate, in my opinion, is in the wrong in accepting a check as money in payment of a license tax due State, County or City, and is estopped from denying his liability for the money due for issuing such license. On the other hand, the person issuing a fraudulent check, cannot, in my opinion, claim, as against the Judge of Probate, that he has paid for the license. He cannot take advantage of his own wrong."

The mere issuance of a license is only evidence of a payment and when the party gives a worthless check, there has been no payment in contemplation of the law and the matter stands as it originally stood. Proper proceedings may be instituted, either civilly or criminally, against the party operating or functioning under said purported license.—Biennial Report of Attorney General 1926-28, page 447; Biennial Report of Attorney General 1928-30, page 48; Quarterly Report of Attorney General, Vol. 18, page 25.

This office has heretofore held that tax collectors are not liable for ad valorem taxes when they have accepted checks in payment of said taxes and the checks have not been paid by the bank upon which they were drawn. This conclusion is based on the theory that the state has lost none of its rights and may proceed to enforce the payment of the taxes as though the checks had not been given. — Biennial Report of Attorney General 1930-32, page 194. It has been held to the same effect in regard to the payment of poll taxes by worthless check in that the receipt may be cancelled and the elector's name stricken from the list of those persons who have paid poll taxes in due time.— Biennial Report of Attorney General 1936-38, page 333.

A party giving a worthless check for the payment of licenses and taxes may be subjected to prosecution under the provisions of Title

14, Section 234(4), 1961 Cumulative Pocket Part, Code of Alabama, Recompiled 1958, for giving a worthless check.

From the foregoing, I am constrained to hold that, regardless of the volume of the business in your office, you would normally be responsible in case of the acceptance of checks in payment of licenses issued by your office, which checks were later dishonored. You would be estopped to deny liability to the state, county, or city for the monies due these governmental agencies respectively in cases when their rights have been prejudiced thereby. Of course, there would be no liability on your part if collection was made of the amounts of the license due either through proceedings of doing business without a license or an action for the collection of said checks.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

May 13, 1963

Hon. Reuben K. King
Commissioner
Department of Pensions and Security
CAPITOL

Pensions and Security, Department of — Blind Persons.

The Department of Pensions and Security, under the provisions of Title 49, Section 17 (7) (5), Code of Alabama 1940, is empowered to comply with Title X, Section 1002 (a), (8), (B), of the Social Security Act, as amended.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion bearing date of May 7, 1963, is as follows:

"Title X, Section 1002, (a), Social Security Act, as amended, (see **Compilation of The Social Security Laws,** 1962, 87th Congress, 2nd Session, House of Representatives, Document No. 616, pp. 173-174), provides:

"'A State plan for aid to the blind must... (8) provide that the State agency shall, in determining need, take into consideration

any other income and resources of the individual claiming aid to the blind, as well as any expenses reasonably attributable to the earning of any such income; except that, in making such determination, the State agency shall disregard (A) the first $85 per month of earned income, plus one-half of earned income in excess of $85 per month, and (B) for a period not in excess of twelve months, 'such additional amounts of other income and resources, in the case of an individual who has a plan for achieving self-support approved by the State agency, as may be necessary for the fulfillment of such plan...'

"The provision of the Social Security Act contained in (B) above resulted from the Public Welfare Amendments of 1962, and is in addition to current provisions relating to the disregarding earned income in aid to the blind by State agencies administering this program.

"The Department of Health, Education, and Welfare in interpreting the Federal amendment, requires a State to disregard for a period not in excess of twelve months income from any source, earned or unearned, and other resources such as property of any kind, in such amounts as may be necessary to the fulfillment of the blind individual's plan for achieving self-support, if that individual's plan is approved by the State agency.

"Code of Alabama 1940, Title 49, Section 17(7), (5), provides:
" 'The aim of the state department shall be the promotion of a unified development of welfare activities and agencies of the state and of the local governments so that each agency and each governmental institution shall function as an integral part of the general system. In order to carry out effectively these aims it shall be the duty and responsibility of the state department to: . . . '(5) Act as the agent of the federal government in welfare matters of mutual concern, and in the administration of any federal funds granted to the state to aid in the furtherance of any of the functions of the state department, and be empowered to meet such federal standards as may be established for the administration of such funds . . .'

"Title 49, Section 17 (14), A, (b), Code of Alabama 1940, provides:

" 'Blind assistance shall be payable under this chapter to or on behalf of any person who shall comply with other requirements of this chapter and who: . . . '(b) has not sufficient income and resources from all sources to provide a reasonable subsistence compatible with decency and health; 'provided, however, that any earned income required by the Federal Social Security Act to be disregarded is hereby excepted. . .'

"Title X, Section 1002, (a), (8), (B), of the Social Security Act,

becomes effective July 1, 1963. It is necessary in the administration of this agency's program that we take immediate action to qualify under this Amendment, made mandatory by the Department of Health, Education, and Welfare, in the event that our current State laws and regulations are not included within the purview of this Amendment.

"Therefore, I request an official opinion as to whether income and resources of recipients of aid to the blind assistance, which income is other than 'earned income' as provided for in Code of Alabama 1940, Title 49, Section 17(14), A, (b), may be disregarded in this State under the terms of Code of Alabama 1940, Title 49, Section 17(7), (5), in cases involving making plans for a period not in excess of twelve months for blind recipients, who have plans for achieving self-support?

"Your consideration of this question will be appreciated."

The question involved in your request is whether Title 49, Section 17(7), (5), Code of Alabama 1940, empowers the State Department of Pensions and Security to comply with Title X, Section 1002, (a), (8), (B), of the Social Security Act, as amended. You cite also Title 49, Section 17(14), A, (b), Code of Alabama 1940, of your public assistance statutes with respect to eligibility requirements for blind assistance, which specifically requires the agency to disregard "any earned income" as provided by the Federal Social Security Act in determining eligibility. It appears that both Subsection 5 of Title 49, Section 17(7), and Title 49, Section 17(14), A, (b), were enacted simultaneously and is a part of Act No. 703, General Acts of Alabama 1951. The pertinent Social Security Amendment in question requires, in determining need, that you consider:

"For a period not in excess of twelve months, 'such additional amounts of other income and resources, in the case of an individual who has a plan for achieving self-support approved by the State agency, as may be necessary for the fulfillment of such plan . . .'"

It has been held by this office that your State Department does have the authority to meet Federal standards which may be established for the administration of State and Federal funds. (See Quarterly Report of Attorney General, Vol. 60, Page 147.) Matters pertaining to the determination of eligibility within a public assistance category would clearly fall within the purview of this opinion. This office ruled that under the same legislative provision to which you now refer, the Department had authority to engage in a program for aid to the permanently and totally disabled without further legislation and stated as follows:

"The State Department of Public Welfare has the duty of ad-

ministering and supervising all forms of public assistance (Title 49, Section 8(1), Code). Further, the State Department is to act as the agent of the Federal Government in welfare matters of mutual concern, and in the administration of any Federal funds granted to the State, to aid in the furtherance of any of the functions of the State Department. The State Department is empowered to meet any Federal standards which may be established for the administration of such funds. (Title 49, Section 8 (6), Code).

Thus, there is ample authority for aid to the Permanently and Totally Disabled as a State program, since such aid is clearly for the relief and support of the poor, is clearly a program with a public welfare purpose, and is clearly a form of public assistance."

Title 49, Section 8, Code of Alabama 1940, is the identical provision as the one enacted in Act No. 703, supra, Section 6, Subsection 5. It appears, therefore, that the Department would have authority to meet changing interpretations and requirements within a particular public assistance category.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

May 15, 1963

Hon. A. W. Todd
Commissioner
Department of Agriculture and Industries
State Capitol
Montgomery, Alabama

State Apiarist — Department of Agriculture and Industries — Words and Phrases.

The Commissioner of Agriculture and Industries may designate the Supervisor of the Division of Plant Industry of the Department of Agriculture and Industries or any other employee of said department as State Apiarist under Act No. 735, General Acts of Alabama 1953, page 994.

Opinion by Assistant Attorney General Bradley.

Dear Sir:

Your request for an official opinion, bearing date of May 7, 1963, is as follows:

"Act No. 735, Legislature of 1953, provides for apiary inspections and related duties for the prevention and control of diseases of honeybees. This work is presently conducted by the Apiary Division of this Department which is headed by an employee designated as 'State Apiarist,' a merit system position established in March of 1952. This division has another merit system and employee designated as an 'Agricultural Inspector,' also a merit system position.

"For the more efficient and economical administration of apiary inspection work, I desire to transfer these duties to the Division of Plant Industry of this Department and abolish the Division of Apiary Inspection together with the present classification of State Apiarist in order that apiary inspection will be conducted by the Division of Plant Industry. The head of the Division of Plant Industry, now designated as 'Supervisor of the Division of Plant Industry,' will be designated as 'Supervisor, Division of Plant Industry and State Apiarist' and the agricultural inspector, now performing apiary inspection work, will be transferred to that Division to continue to perform apiary inspection work.

"The above administrative and personnel changes must be effected with approval of the State Personnel Department and it has been suggested that the provisions of Act No. 735, Legislature of 1953, may have the effect of creating the position of State Apiarist as a separate statutory position which would prevent the above mentioned transfer of duties and personnel.

"I shall appreciate it if you will advise me of the legal status of the position of 'State Apiarist' referred to in Act No. 735, that is, does this Act creat a statutory position designated as 'State Apiarist' to the extent that his duties cannot be performed by he Supervisor of the Division of Plant Industry a qualified entomologist who performs all other entomological duties for this Department."

Your request for an opinion from me concerns the question of whether or not by Act No. 735, General Acts of Alabama 1953, page 994, the Legislature created the position of "State Apiarist" so as to prevent the Commissioner of Agriculture and Industries from designating some employee of the Department of Agriculture and Industries other than the present holder of the position to be "State Apiarist."

It is my opinion that the Legislature did not create a statutory position of "State Apiarist" in the Department of Agriculture and Industries so that the Commissioner would be precluded from designating someone else "State Apiarist" and assigning the duties of the position to that person.

Refer to Section 10 of Act 735, supra, wherein it is provided:

"Section 10. State Apiarist.—The employee of the State Department of Agriculture and Industries designated as State Apiarist shall exercise all the powers vested in the Commissioner of Agriculture and Industries in the enforcement of the provisions of this Act except the review procedure to be performed by the Commissioner under the provisions of Section 8 of this Act."

It appears obvious from the language of Section 10, supra, that the Legislature wished to give the Commissioner a wide latitude in selecting the person or persons to carry out the provisions of Act No. 735, supra.

The Legislature said the "**employee** . . . designated as State Apiarist . . . ." (Emphasis supplied) Hence, it appears that the Commissioner is authorized to designate any employee in the Department of Agriculture and Industries as State Apiarist.

In attempting to ascertain the intent of the Legislature at the time of the passage of an Act, we try to follow certain rules so that there will be some order in the process used to determine the legislative meaning.

One of these rules is found in the case of **Usher v. Dept. of Industrial Relations, 75 So. 2d 159,** wherein the Court said:

"Under the guise or pretense of judicial construction of interpretation the courts have no authority or right to redraft the law."

The Court sets out another rule in **Holt v. Long,** 234 Ala 369, 174 So. 759:

". . . courts must confine themselves to the construction of the law as it is, and not attempt to supply defective legislation, or otherwise amend or change the law under the guise of construction."

Therefore, by observing the above rules in searching for the intent of the Legislature, I am of the opinion that the Legislature did not intend to create the statutory position of "State Apiarist" and limit the holders to those selected under the merit system, but, on the contrary, intended that any employee of the Department could be designated by the Commissioner as "State Apiarist."

I am of the further opinion that pursuant to present legislative authority, the Commissioner of Agriculture and Industries may designate the Supervisor of the Division of Plant Industry or any other employee in the department as State Apiarist.

Very truly yours,

RICHMAND M. FLOWERS
Attorney General

May 15, 1963

Honorable James G. McLean
Executive Secretary
Alabama State Milk Control Board
364 South Ripley Street
Montgomery, Alabama

Milk Control Board — Compensation — Words and Phrases

A member of the Alabama State Milk Control Board cannot be compensated while engaged in official functions of the board for more than fifty days per annum as limited by Title 22, §207, Code of Alabama 1958 Recompiled (1961 Pocket Part). Said limitation of fifty days per annum is based upon the State fiscal year from October 1 through September 30, but does not apply to amounts that may be received for subsistences and travel expenses.

Opinion by Assistant Attorney General Screws.

Dear Mr. McLean:

Your request for an official opinion bearing date of May 10, 1963 is as follows:

"Would you please submit an opinion as to whether or not one member of the Alabama Milk Control Board can be compensated while engaged in official functions of the Board for more than 50 days per annum, provided the total number of days for which all five members of the Board are compensated does not exceed 250 days per year?

"Section 207, Title 22, Code of Alabama 1940, as amended, is the section which governs the pay and days of the members.
"Your cooperation is appreciated."

In answer to your inquiry, it is my opinion that a member of the Alabama State Milk Control Board cannot be compensated while engaged in the official functions of the Board for more than fifty days per annum.

Title 22, Section 207, Code of Alabama 1958 Recompiled (1961 Pocket Part, Last Amendment) provides in pertinent part as follows:

"§ 207. Milk control board. — . . . The compensation of the members of the Alabama state milk control board shall be thirty dol-

lars per day for each day actually engaged in the official functions of the Alabama state milk control board, not to exceed fifty days per annum, plus subsistence and necessary traveling expenses at the rate allowed other state employees. (1939, p. 267; 1951, p. 1383, appvd. Sept. 11, 1951; 1961, No. 497, § 2, appvd. Aug. 21, 1961.)"

The words "not to exceed fifty days per annum," without question, place a limitation upon the number of days for which each member of the board may be paid the prescribed daily compensation in any one year. This is true, regardless of whether or not each member of the Board receives his maximum compensation. In other words, one member of the Board cannot be allowed compensation for more than fifty days per annum even though other members may not receive the maximum compensation for fifty days.

This office has heretofore ruled to the same effect as above in an opinion rendered to the Chairman of the Alabama State Milk Control Board, dated March 14, 1952 (Quarterly Reports of Attorney General, Volume 66, page 96). It was there held that each member of the Alabama State Milk Control Board was limited to the maximum number of days per annum sixty days at that time) for which daily compensation may be paid such members, but such limitation does not apply to the amount the members of the Board may receive for subsistences and travel expenses.

I also wish to invite your attention to a letter of this office written to the Executive Secretary of the Alabama State Milk Control Board, dated September 18, 1956, wherein it was ruled that the term "per annum" as used in Section 207, supra, refers to the official year for the operation of said Board, which is the State fiscal year from October 1 through September 30 of each year.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

May 17, 1963

Honorable J. Gilmer Blackburn
Mayor

Honorable Ira J. Higginbotham
Commissioner

Honorable L. S. Hunt, Jr., Commissioner
City of Decatur
Decatur, Alabama

Honorable Gerald W. Neher
Chairman

Honorable R. S. Hicks
Member

Honorable H. A. Wyatt
Member
Municipal Utilities Board of Decatur
Decatur, Alabama

Municipalities — Public Utilities — Refunds — Taxation.

1. When a municipality owns and operates a public utility, it is engaged in a proprietary or business enterprise and is not operating in its governmental capacity.

2. The charge made by municipal utilities is compensation for the service furnished by the facility and is not the exaction of a tax.

3. Refunds made to a municipality by a supplier of natural gas may be paid to the customers of the municipal gas distribution system.

Opinion by Assistant Attorney General Gish.

Dear Sirs:

Your request for an official opinion, under date of May 14, 1963, is as follows:

"The City of Decatur is the owner and operator of a municipal gas distribution system and acquires its supply of natural gas for resale to the public under contract with Alabama-Tennessee Natural Gas Company, an interstate carrier operating under a Certifi-

cate of Public Convenience and Necessity from the Federal Power Commission.

"Heretofore, on or abount December 15, 1954, Alabama-Tennessee Natural Gas Company increased its rates for the resale of natural gas to the City of Decatur, which rate increase was not passed on to the customers of the City of Decatur Gas System.

"Thereafter, on July 24, 1957, Alabama-Tennessee Natural Gas Company increased its gas rates to the City of Decatur and that increase was not passed on to the gas customers of the City of Decatur.

"Thereafter, on May 15, 1959, and on April 5, 1960, Alabama-Tennessee Natural Gas Company put into effect two increases in its gas rates to the City of Decatur, both of which were passed on to the City of Decatur gas customers by increases in its gas rates. At the time of the increases in its rates put into effect by the City of Decatur, contracts in writing were made by the City of Decatur with each of its industrial customers, providing for the passing on to them of the increases in the cost of gas at wholesale, with the agreement that if any part of the increases put into effect by Alabama-Tennessee Natural Gas Company was disallowed by the Federal Power Commission that their proportionate parts of any refund received by the City of Decatur from Alabama-Tennessee Natural Gas Company would be passed on to them.

"The four increases in such gas rates made by Alabama-Tennessee Natural Gas Company were collected from the City of Decatur, subject to review and final hearing of the Federal Power Commission. Each of such increases was resisted and contested by the City of Decatur. Upon final hearing and determination by the Federal Power Commission, the full amount of such rate increases was not allowed. By an order issued August 3, 1962, pursuant to Opinion No. 360 of the Federal Power Commission, Alabama-Tennessee Natural Gas Company was required to reduce its rates and make refunds to the City of Decatur. Under the provisions of said Opinion No. 360 of the Federal Power Commission, the City of Decatur received a refund on August 21, 1962, of $181,888.91, including interest, and received a further refund on December 28, 1962, of $198,062.83, including interest.

"The City of Decatur gas distribution system is operated by the Municipal Utilities Board of Decatur, which was created by Local Act No. 89 of the Alabama Legislature in 1939, approved March 3, 1939. The increases in the gas rates made by the City of Decatur, which were adopted to meet the increases in rates of Alabama-Tennessee Natural Gas Company were established by Ordinances adopted by the Board of Commissioners of the City of

Decatur after recommendations from the Municipal Utilities Board of Decatur that such increases in rates were necessary in order to meet the increased cost of natural gas caused by the increases in rates my the Alabama Tennessee Natural Gas Company, which said increases were subsequently disallowed in part by the Federal Power Commission.

"After the Federal Power Commission issued its Opinion No. 360 reducing the rates charged by Alabama-Tennessee Natural Gas Company to the City of Decatur, the City of Decatur, by ordinance adopted by the Board of Commissioners upon recommendation of the Municipal Utilities Board, reduced its rates to customers accordingly.

"After receipt of the refunds from Alabama-Tennessee Natural Gas Company, the City of Decatur has made refunds to its industrial customers in accordance with the written contracts made with them when the increases in the rates charged by Alabama-Tennessee Natural Gas Company were passed on to them.

"The members of the Municipal Utilities Board and the members of the Board of Commissioners of the City of Decatur desire that refunds be made to the commercial and residential customers of the City of Decatur gas distribution system from and out of the refunds received by the City of Decatur from Alabama-Tennessee Natural Gas Company pursuant to said Opinion No. 360 issued by the Federal Power Commission, and the members of the Board of Commissioners of the City of Decatur and the members of the Municipal Utilities Board of Decatur hereby request your official opinion as to whether or not such refunds can be made and whether or not the Board of Commissioners of the City of Decatur and the Municipal Utilities Board of Decatur have the legal authority to make such refunds as lawful municipal expenditures."

As stated in your request the gas distribution system of the City of Decatur is operated by the Municipal Utilities Board of Decatur, which was created by Act No. 89, Local Acts 1939, page 47.

Section 9 of Act No. 89, supra, reads in part as follows:

"The Board shall have complete control of the public utilities owned by the City of Decatur, . . . It shall have the power and authority and it shall be its duty to charge for and collect all accounts due for any service which the utility may furnish to its customers, upon rates to be provided and approved by the City Council of the City of Decatur, Alabama . . . "

When a municipality owns and operates a public utility, it is engaged in a proprietary or business enterprise and is not operating in its

governmental capacity. Our statutes vest in such municipalities the exclusive authority to fix the rates charged for service rendered by such utilities. **Mitchell v. City of Mobile,** 244 Ala. 442, 13 So. 2d 664. See also Quarterly Report of Attorney General, Vol. 49, page 34.

Charges for municipal utilities service must be reasonable to both the customers of the facility and its operators. Said charges must have relation to the benefits to the customers and to a reasonable return on the investment of the municipality. Quarterly Report of Attorney General, Vol. 99, page 7. Thus, the charge made for municipal utilities service is compensation for the service furnished by the facility and not the exaction of a tax. **Waterworks and Sanitary Sewer Board et al v. Dean,** 260 Ala. 221, 69 So. 2d 704.

Municipal funds derived from taxes may not be refunded to the taxpayers without express authority from the Legislature. Cf. Opinion to Honorable Les Gilliland, Mayor, City of Gadsden, under date of January 23, 1963. However, since the funds paid to the City of Decatur on August 21, 1962 and on December 28, 1962 by the Alabama-Tennessee Natural Gas Company were originally derived not from taxes but from charges made for the distribution of gas, there is no prohibition against paying such funds to the customers of the gas distribution system of the City of Decatur.

Therefore, I am of the opinion that the Municipal Utilities Board of the City of Decatur may make the refunds to which your request refers on any reasonable basis established by ordinance or resolution of the governing body of the City of Decatur.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

May 17, 1963

Mr. E. E. Lowe, Jr.
314 North 9th Street
Opelika, Alabama

Cost and Fees — Counties — Fine and Forfeiture Fund — Sheriffs

The sheriff not entitled to arrest fees for services performed where no indictment was returned against the defendant and they are not lawful claims against the county's fine and forfeiture fund or general fund where combined.

Opinion by Assistant Attorney General Webb.

Dear Mr. Lowe:

I have received your letter of May 8, 1963 in which you request my opinion as follows:

"I served as Sheriff of Lee County, Alabama, until January 15, 1963. At the present time, an examiner from the Office of the Examiner of Accounts is auditing the records of the Sheriff of Lee County, Alabama. I have always drawn an arrest fee for and approving of bail bonds from the general funds of Lee County (fine and forfeiture fund having been abolished) where a person was charged with a felony and I arrested him if the Grand Jury of Lee County did not indict the person. The question that is raised by the examiner of Public Account is this,

" 'Is a Sheriff entitled to an arrest fee from the general funds (fine and forfeiture having been abolished) for arresting a person on a felony warrant and where the person is bound over to the Grand Jury and against whom a no bill was found by the Grand Jury?' "

Claims against the fine and forfeiture fund are made under the provisions of Title 15, Section 393, Code of Alabama Recompiled 1958. The Supreme Court of Alabama, in the case of **Kilgore v. Swindle,** 219 Ala. 378, 122 So. 333, in interpreting Section 393, supra, has held that fees due the sheriff for services performed when no indictment was returned against the party under investigation are not a lawful claim against the county's fine and forfeiture fund, notwithstanding the provisions of Section 393, supra, providing for payment from that fund of fees of officers in criminal cases in which the defendant is not convicted. See, also, Quarterly Report of Attorney General, Volume 17, page 43.

As stated by you, the fine and forfeiture fund of Lee County has been abolished and combined with the general fund, under the provisions of Act No. 683, Acts of Alabama 1949, page 1053. I have carefully reviewed the provisions of Act No. 683, supra, and am of the opinion that this act in no way affects the provisions of Section 393 of Title 15, supra, insofar as the same limits the fees that may be paid from the fine and forfeiture fund. I am, accordingly, of the opinion that your question should be answered in the negative.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

May 24, 1963

Honorable Lloyd G. Hart
Judge of Probate
Conecuh County
Evergreen, Alabama

Deeds — Deed Tax — Executors — Trust and Trustees — Opinions Overruled, Modified or Distinguished.

1. Where a testator devised and bequeathed his residuary estate in trust to certain trustees, the deed of his executrices conveying the realty of said estate to said trustees was not subject to the filing tax for deeds. Title 51, Section 618, Code of Alabama 1940, as amended.

2. The exceptions provided for as to deeds or instruments executed for a nominal consideration for the purpose of perfecting the title to real estate does not extend to deeds executed for the purpose of perfecting title to personal property.

3. Quarterly Report of Attorney General, Volume 22, page 153, insofar as it deals with personal property is overruled.

Opinion by Assistant Attorney General Webb.

Dear Sir:

Your letter of May 10, 1963 to the State Department of Examiners of Public Accounts has been forwarded to this office for reply. You requested an official opinion as follows:

"I am inclosing herewith a Photostat copy of the Will of Egbert B. Stowers, deceased, and a copy, unexecuted Deed which carries out the trust that is set up in the Will in paragraph three (3) and four (4).

"Please advise me by return mail whether or not there will be any filing or deed tax on said instruments, and if so the amount of said filing or deed tax."

Attached to your letter were two instruments, the first constituting a deed passing title to certain described real and personal property to the trustees of the estate named under the provisions of the Last Will and Testament of the deceased and the second instrument attached to your letter was a copy of the Last Will and Testament of the deceased.

Under the terms and provisions of Items 3 & 4 of the Last Will

and Testament of deceased, the residue and remainder of the estate, after payment of just debts and expenses, taxes and after gifts and bequeaths of certain items or personal property, was given, bequeathed and devised in trust for uses and purposes specifically designated under the terms of the will. The trustees of the trust are specifically named under these provisions.

Normally, a deed for the purpose of acquiring title, even though on a nominal consideration, is taxable. See **Hawkins v. Pure Oil Company,** 232 Ala. 660, 169 So. 307; Biennial Report of Attorney Gen. eral 1926-1928, page 49 (cited in the Hawkins case, supra); Quarterly Report of Attorney General, Volume 8, page 132; Quarterly Report of Attorney General, Volume 35, page 100; Quarterly Report of Attorney General, Volume 53, page 124.

However, in Quarterly Report of Attorney General, Volume 22, page 153(160), this office held in a case involving a situation very similar to that presented by you, that legal title to the residuary estate, by virtue of the will, vested upon the instant of the death of the testator in the trustees subject only to interception for certain purposes by his personal representative. This office further held that the situation is to be distinguished from that considered in other opinions of this office such as Quarterly Report of Attorney General, Volume 8, page 132, supra, in which opinion it appears that the testator had, in effect, devised his estate to his executors in trust for the benefit of certain named beneficiaries and that under the will it was necessary for the executors to execute deeds to the beneficiary in order to divest themselves of legal title and vest the same in the beneficiaries. The opinion was expressly rested upon the premise that the legal title "had apparently remained in the executors" until execution of their deeds to the beneficiaries. Such is not the case in the present instance. In our situation, legal title has been in the trustees continuously since the testator's death without interruption or interception by the executrices at any time. The executrices have executed their deed merely to quiet that title and place the same beyond the pale of controversy in the future.

The instant situation is further distinguished from the holding of the Supreme Court of Alabama in the Hawkins case, supra. In that case the petitioner, the Pure Oil Company, had acquired all the stock of the Wofford Oil Company, whereupon the latter company was dissolved, its debts and liabilities paid, with the result that petitioner then owned the legal title to all property of the dissolved corporation. In its holding, the court distinguished between the exception granted by statute, which is for the purpose of perfecting title, and the acts of the petitioner which was for the purpose of perfection of the record of transaction. The court thereupon held that the recording of the deed for the purpose of perfecting a record of transaction, such as that involving merger or consolidation of companies, was taxable, the

record of transaction being the business proceedings and contractual relationships entered into by which the defunct corporation merged or consolidated with the grantee. The court held, in part, that had the purchase of all the property and assets of the defunct corporation followed the ordinary course, the deed, which represented the culmination of the transaction, would, of course, have required the recording tax. The mere fact that the transaction took the more circuitous route of, first, a purchase of all the stock and, then, the deed, does not change its character but only the form of the transaction and, though legal title had passed upon the culmination of the original transaction, the record of the deed constituted more than the perfection of title and, as stated, was, in fact, the perfection of the record of transaction itself. In the instant proceeding, as stated, the property passed by will invested in the trustees upon the instant of the death of the testator. There were no preceding circuitous or business transactions involved and the executrices were performing no more than nominal functions in perfecting the record title.

I am, therefore, of the opinion that the deed in question, insofar as the same relates to realty, is an instrument executed for a nominal consideration for the purpose of perfecting the title and that that portion of said deed would, therefore, not be taxable under the provisions of Title 51, Section 618, Code of Alabama 1940, as amended. Quarterly Report of Attorney General, Volume 22, page 153(160).

I further note, however, in the deed in question that title is passed to certain personal property such as motel stock, remaining funds received from the estate, and to estate accounts in the Bank of Evergreen.

I am of the opinion that the exemption granted for deeds for the purpose of perfecting title to real estate does not extend to deeds perfecting title of personal property. As stated in the Hawkins case, supra, the general rule is well-recognized that exception should be strictly construed. If there is doubt about an exception in a statute, it must be judged on the assumption that the rule is broader than the exception and all doubts and implications should be resolved in favor of the rule rather than the exception.

I am, therefore, of the opinion that the deed filing tax provided for under the provisions of Section 618, supra, should be collected as to all personal property conveyed under the terms of the deed.

Quarterly Report of Attorney General, Volume 22, page 153, insofar as it pertains to personal property is accordingly overruled.

You further request, in your letter, that I advise you the amount of the filing or deed tax. The deed tax provided for under the pro-

visions of Section 618, supra, is based on the value of the property conveyed. The value of all the personal property conveyed under the terms of the deed you enclosed is not apparent on the face of the deed.

I, therefore, am unable to advise you of the amount of the filing tax.

I am of the opinion that you should require affidavits or such other evidence as may be necessary to satisfy you of the value of the personal property conveyed and apply the schedule of tax provided for under the provisions of Section 618, supra.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

May 29, 1963

Mr. Alton D. Miller
Director, Madison County
Motor Vehicle License Department
Court House Annex
Huntsville, Alabama

Motor Vehicles — Licenses — License Tags — Dealer Tags or Permits

1. Title 51, Section 464, Code of Alabama 1940, when read with Sections 631, as amended, and 634, and the other general provisions of Title 51, Code of Alabama 1940, relating to motor vehicle licenses, as well as other license taxes, requires that an automobile dealer procure and display on a motor vehicle which he is displaying, demonstrating, transporting or testing a dealer's tag before he operates such a vehicle on the highways of this State.

2. The provisions of Title 51, Section 464, as amended, Code of Alabama 1940, which expressly extend the time for a "purchaser" of a new or used motor vehicle for four days from the date of purchase, do not apply to the one dollar dealer's tag or permit, which tag is also provided for under the same Code Section.

Opinion by Assistant Attorney General Burton.

Dear Sir:

Your request for an official opinion bearing date of May 16, 1963, is as follows:

> "It has been requested of me to obtain a ruling on the following subject:
>
> > "Is an automobile dealer allowed to operate a vehicle he has purchased on the public highways of Alabama without a tag? Does he have the same time allottment as a tag purchaser as reference shown in title 51 Section 464 Alabama Code?"

The answers to both of your questions are in the negative.

Title 51, Section 464, Code of Alabama 1940, is said to relate to the "Purchaser of Tags". The first sentence of this Section deals with the "purchaser" of an automobile, new or used, and provides in this respect as follows:

> "**A purchaser** of a new or used motor vehicle may be granted **four days from date of purchase** in which to procure license tag." (Emphasis supplied)

The remainder of Section 464 which includes some four sentences relates to an automobile dealer, and is as follows:

> "**A dealer** who has a license under the two preceding sections shall be permitted to procure one demonstration tag for each salesman in his employ, at a cost of one dollar per tag. Provided that additional dealer tags may be procured to be used exclusively in transporting motor vehicles owned by the dealer. **Such dealer tags** may be used for displaying, demonstrating, transporting and testing new and used passenger cars and trucks, and such other uses incident to conducting a general automobile agency. Such tags may be used at any time, day or night, and any prospective purchaser may make demonstrations to his own satisfaction without the automobile dealer's representative being in attendance." (Emphasis supplied.)

Thus, Section 464 deals with two separate and distinct persons, the "purchaser" of a new or used motor vehicle on the one hand and in the first sentence, and a "dealer" in motor vehiclese on the other hand and in its remaining provisions.

Webster's New International Dictionary, Second Edition, at pages 675 and 2015, respectively, substantially defines a "purchaser" as one who buys or purchases, as distinguished from a "dealer" who is said

to be one who makes a business of buying and selling. They are then two entirely different persons, and have been so treated in Section 464, supra.

Neither Section 464, supra, nor as far as I can find any of the other provisions of the license or motor vehicle laws make any provision for the time for the procurement of the dealer's tag or permit to be extended to four days or otherwise. To the contrary the general provisions which relate to the time required for procuring licenses, including motor vehicle licenses, which are found in Title 51, Section 831, as amended, and Section 834, Code of Alabama 1940 require, unless it is otherwise expressly provided, that a person shall first procure a license before he does any act for which a license is required by law.

Yours truly,

RICHMOND M. FLOWERS
Attorney General

May 31, 1963

Hon. W. A. Bratton
Sheriff
Sumter County
Livingston, Alabama

Costs & Fees — Corrections & Institutions — Inquests — Insane Person — Jails — Prisons & Prisoners — Sheriffs.

1. Removal of prisoners accomplished under Title 45, Section 133, Code of Alabama Recompiled 1958, payable under the provisions of Title 11, Section 100, Code of Alabama Recompiled 1958.

2. When more than one prisoner is removed by sheriff with one trip, only one per diem and mileage may be charged under the provisions of Title 11, Section 100, supra. 3. For summoning a jury and attending on the jury in a lunacy inquisition in probate court, the sheriff is entitled to a fee of Eleven Dollars ($11.00). Title 11, Section 34, Code of Alabama Recompiled 1958.

Opinion by Assistant Attorney General Webb.

Dear Mr. Bratton:

I have received your letter of May 7, 1963 in which you request

my official opinion as follows:

"Your official opinion is requested on the following questions:

"1. Sumter County is tearing down the old jail, and will erect a new one on the same site. Pursuant to Title 45, Section 133, Code of Alabama, 1940, I will take all prisoners committed to jail to Linden to the Marengo County Jail, by virtue of an order from the Judge of the County Court of Sumter County.

"(a) If I take two or more prisoners from Livingston to Linden on the same trip, may I claim mileage reimbursement @ 10c per mile when my personal car is used, for **each** prisoner, and may I claim per diem for myself and guard accompanying me on **each** prisoner? In other words, may I legally claim mileage twice of 72 miles @ 10c, making a total of $14.40, and $16.00 per diem for Sheriff, and $16.00 per diem for Guard, if I with one guard, take two prisoners from Livingston to Linden, or return two prisoners from Linden to Livingston for trial, under provisions of Title 11, Section 100 (first paragraph on removing prisoners)? The distance from Livingston to Linden is 36 miles.

"(b) If you rule that I may legally collect mileage for one and per diem for one on each trip, how will the removal costs be charged against each prisoner by the Circuit Clerk or County Court?

"(c) If I take only misdemeanor prisoners on a trip, may I claim $8.00 per diem for Sheriff and $8.00 per diem for Guard, if Guard is authorized by Judge of Probate? If guard for misdemeanor prisoner removal were authorized by Circuit Judge, could I claim $8.00 per diem for guard?

"2. The following question arises from summoning juries in a lunacy hearing in Probate Court:

"(a) Title 11, Section 34, Code of Alabama 1940, recites 'Summoning jury for any inquisition in the county, and attending on such jury, **when no other provision is made by law** ... 5.00', and on the next page 'Attendance upon the Probate Court when a jury is in attendance ... 5.00'. May I draw a total of $11.00 for each day that I summon a jury and attend on said jury in a lunacy inquisition in Probate Court, or $5.00, or $6.00?"

There is no question in this case of the authority of the county to erect a new jail. Title 12, Section 185, et seq., Code of Alabama 1940 (Quarterly Report of Attorney General, Volume 20, page 364).

You state that the County Court has, on application, ordered all prisoners transferred to Marengo County jail at Linden, Alabama under the provisions of Title 45, Section 133, Code of Alabama 1940. Payment for such transfers is authorized under the provisions of Title 11, Section 100, Code of Alabama 1940, as amended (Biennial Report of Attorney General 1918-1920, page 470).

I assume that your question refers to those prisoners presently confined in the Sumter County jail awaiting trial for there is no provision of law for payment of the fees authorized under the provisions of Title 11, Section 100, for prisoners already convicted and serving their sentence. With this assumption in mind and, with regard to your questions 1(a) and 1(b), I am of the opinion that, when two or more prisoners are removed in one trip, you are entitled to charge but one per diem and mileage fee. In this regard, your attention is invited to Quarterly Report of Attorney General, Volume 29, page 36, affecting venue removals. This charge should be made by the Court against one of the prisoners on conviction who is able to pay. In the event that none is able to pay or all are acquitted, the charge may be properly presented to the county. Title 11, Section 100, supra.

As to the question of 1(c), I find no distinction drawn in Title 11, Section 100, insofar as the same relates to removals of this type between misdemeanor and felony prisoners.

In answer to your second question, it is my opinion that you are entitled to a total of Eleven Dollars ($11.00), under the provisions of Title 11, Section 34, Code of Alabama 1940, as amended, for summoning a jury and attending on the jury in a lunacy inquisition in probate court. This office has previously ruled in Quarterly Report of Attorney General, Volume 43, page 21, that for summoning a jury in a lunacy inquisition the sheriff is entitled to a five-dollar fee, under the provisions of Section 34, supra, cited by you. I am further of the opinion that, for attendance on court when the jury is in attendance, you are entitled to the additional fee of Six Dollars ($6.00).

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

June 4, 1963

Honorable W. F. Maynor
Judge of Probate
Blount County Court House
Oneonta, Alabama

Taxation — Filing — Mortgages.

In order for an additional security mortgage to fall within the exemption provided in Section 619(d), Title 51, Code of Alabama 1940, the indebtedness must remain unchanged in time of maturity; however, the indebtedness does not need to remain unchanged in amount so long as the indebtedness secured in the additional security mortgage is the same indebtedness as that secured by the original mortgage.

Opinion by Assistant Attorney General Loeb.

Dear Judge Maynor:

Your request for an official opinion bearing date of April 25, 1963, is as follows:

"A few days ago Mr. Walter Dickson of Thompson Tractor Company, called me about a Chattel Mortgage, a copy of which is enclosed herewith. His question was with reference to the Five Hundred Twenty Five Dollar mortgage tax that we charged on same.

"It was his opinion, since the mortgage stated in one section, which I have designated with red check, that same was for additional security that the Five Hundred Twenty Five Dollar tax was not due.

"I informed him after reviewing Title 51, Section 619, Paragraph D, Code of Alabama 1940 as revised, that it was my opinion that the tax was due, since he admitted to me that the original amount of the mortgage was considerably less than the said total of the Conditional Sales Contract. Of course the time in which to pay has been extended.

"Mr. Dickson was not satisfied and requested forms for a refund, which I doubt if he is entitled to.

"You will further notice that he furnished no evidence on the Chattel Mortgage, which he said is additional security, that the Conditional Sales Contracts were recorded and that tax had been

paid on them, therefore I would like an opinion if Thompson Tractor Company, Inc. who paid the tax on Chattel Mortgage in question is due a refund."

Title 51, Section 619(d), as amended, Code of Alabama 1940, reads as follows:

"The privilege taxes required by law to be paid on mortgages, deeds of trust, and similar instruments shall not be required on or for the filing of any such instrument, providing additional of substantial [sic] security for any indebtedness secured by an instrument previously filed, upon the filing of which the taxes provided by law have been paid or which was filed at a time when no such privilege taxes were required by law, provided the secured indebtedness remains unchanged in amount and in time of maturity."

From the recitations contained in the Chattel Mortgage, it appears that one of the purposes of this instrument is "to reschedule payments on all previous indebtedness now remaining unpaid by the mortgagor". It also appears from the face of the instrument that there have been previous extension agreements between these same parties relating to some of the original conditional sales contracts. Based upon this information, I am assuming that the dates of maturity for the various conditional sales contracts, which are the subject of the instrument in question, have been changed at least once, and are probably being changed again as a result of this Chattel Mortgage agreement. If this assumption is correct, then this mortgage would not fall within the provisions of sub-section (d), supra, since such section expressly provides that the indebtedness must remain unchanged in time of maturity. See Quarterly Report of the Attorney General, Volume 24, page 234.

This statute also provides that the indebtedness must remain unchanged in amount; however, I do not think that this means that payments could not have been made on the original mortgage which would have the effect of reducing the amount of the indebtedness at the time the additional security mortgage is executed. Had the legislature intended that the amount of indebtedness be the same in dollars and cents at the time of the execution of the additional security mortgage, such mortgage would have to be executed before any payments were made on the original mortgage. This would reduce the field of operation of this subsection to such a limited extent that I cannot believe that such was the legislative intent. So long as it is the **same** debt, that is sufficient.

In your letter, you have not stated whether the original conditional sales contracts were recorded and, if so, whether the mortgage tax was paid. Of course, it is a prerequisite of subsection (d), supra, that they be recorded and the tax paid. These facts can be ascertained by you

either from the records in your office, if they were recorded there, or by affidavit, or any other evidence which you consider sufficient.

In conclusion, let me say that I have some serious doubts as to whether this mortgage is, in fact, an "additional security" mortgage. It appears to me, from reading your letter and the mortgage itself, that the mortgagors are conveying no property other than that which has been previously covered in the original conditional sales contracts, and that, therefore, this is but a consolidation of all the previous mortgages, probably for the purpose of refinancing and extending the time for payment. This, of course, is but an assumption on my part since such facts are not ascertainable from the information I have before me.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

June 7, 1963

Honorable Eugene J. Anderson,
Honorable Gordon P. Hughes, and
Honorable Joseph A. Balch, Jr.
Commissioners of the Town of Madison
Madison, Alabama

Elections — Government — Municipalities.

1. Where a change in the form of municipal government is directed by the electorate, such change shall become effective on October 1, of the next general municipal election year.

2. 1964 will be the next general municipal election year in this State.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion, under date of May 27, 1963, is as follows:

"Title 37, Section 133, sub-paragraph 1, which was approved June 18, 1959 as follows:

" 'When change to commission or mayor-council form of government takes effect.- No change from the mayor-council form of

municipal government to the commission form of municipal government hereafter directed by vote of the electors of any municipality in this state shall become effective until October first of the general municipal election year next following the election at which such change is voted. No change from the commission form of municipal government to the mayor-council form of municipal government hereafter directed by vote of the electors of any municipality in this state shall become effective until October first of the general municipal election year next following the election at which such change is voted. The term of any commissioner which might expire before such date is hereby extended until such date when the form of government changes.'

"The Town of Madison is now governed by a Commission form of government and the three commissioners were sworn into office on October 1, 1961, a four year term.

"A petition to change the Commission form of municipal government to the Mayor-council form of municipal government has just been filed with Ashford Todd, Judge of Probate of Madison County, Alabama.

"Please render us an opinion as to the time the new government would take office, if electors vote to change the form of government and does in fact elect a Mayor-council municipal form of government.

"We have been advised by our legal counsel that the section above quoted clearly states that the new government would take office October 1, following the next general election, which would be on October 1, 1965."

The statute which is quoted in your request was originally enacted as Act No. 71, Acts of Alabama 1959, page 477.

Under the provisions of Act No. 71, supra, no change from the commission to the mayor-council form of government directed by vote of the electors of a municipality shall become effective until October 1, of the general municipal election year next following the election at which such change is voted.

The next general municipal election year in Alabama will be 1964. See Title 37, Section 404, Code of Alabama 1940, as amended by Section 1 of Act No. 666, Acts of Alabama 1961, page 910.

Therefore, in the event that the result of the proposed election to which your request refers directs a change in the form of government of the Town of Madison, such change will not become effective until October 1964.

It should here be pointed out that, in the event such change in the form of government of said Town is directed by the electorate, the election to select a mayor and members of the town council should be held in 1964, under the provisions of Act No. 663, Acts of Alabama 1961, page 827.

It should also be pointed out that the problem presented by your request is not controlled by the case of **Connor v. State, ex rel. Boutwell,** (Ms. May 23, 1963). The Supreme Court of Alabama in that case construed a general law of local application in holding that Act No. 71, supra, does not apply to the City of Birmingham. There is no comparable local statute applicable to the Town of Madison.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

June 17, 1963

Honorable Albert Boutwell
Mayor, City of Birmingham
Birmingham, Alabama

Municipalities — Officers and Offices — Statutes.

1. The City Council of the City of Birmingham must select one of its members to serve during his term of office as a member of the Park and Recreation Board of said City.

2. Rules of statutory construction discussed.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion, under date of June 11, 1963, is as follows:

"A written opinion is hereby respectfully requested for and on behalf of the Governing Body of the City of Birmingham relative to the filing of a certain existing vacancy on the Park and Recreation Board of the City of Birmingham under the provisions of Section 725, Title 62, Code of Alabama 1962.

"Enclosed herewith is a certified copy of a resolution of the Council of the City of Birmingham adopted at a regular meeting held June 11,

1963, setting forth facts showing the nature and character of the question which makes your advice or opinion necessary."

The question presented by the Resolution of the City Council of the City of Birmingham, attached to your request, is whether said Council may select one of its members to serve during his term of office as a member of the Park and Recreation Board of said City.

The City of Birmingham has a Mayor-Council form of municipal government which was organized under and is controlled by the provisions of Act No. 52, Acts of Alabama 1955, page 1004.

Section 3.04 of Act No. 452, supra, provides that no member of the City Council shall hold any public office except that of Notary Public, member of the National Guard, or member of the Naval or Military Reserve.

Title 62, Section 725, Code of Alabama 1940, which applies to the City of Birmingham reads in part as follows:

". . . One member of the governing body of the city selected by such governing body shall at all times be a member of said park and recreation board, provided that if there be in the city a member of the governing body whose department of the city government has the supervision of the parks of the city, such member shall by virtue of his office be a member of the park and recreation board. . . ."

In construing a statute we must not only look to its language but must resort to the intention of the legislature, the purpose and object of the enactment, and its relation to other laws and conditions which may arise under its provisions. **Town of Graysville v. Johnson,** 33 Ala. App. 479, 34 So. 2d 708. See also the rules of statutory construction stated in the opinion reported in Quarterly Report of Attorney General, Vol. 24, page 146.

Therefore, I am of the opinion that Section 3.04 of Act No. 452, supra, does not prohibit a member of the City Council of the City of Birmingham from serving as a member of the Park and Recreation Board of said City in accordance with the provisions of Title 62, Section 725, supra. To hold otherwise would render impossible the filling of the position on the Park and Recreation Board reserved for a member of the municipal governing body. This was not the intention of the legislature.

No member of the City Council of the City of Birmingham heads a department of municipal government which supervises the parks of said City. For this reason there is no member of said Council who is a member of said Park and Recreation Board by operation of law.

Premises considered, you are advised that the City Council of the City of Birmingham is authorized and is under a duty to select one of its members to serve during his term of office as a member of the Park and Recreation Board of said City.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

June 17, 1963

Honorable Don Salter
Member, Town Council
Town of Mulga
Mulga, Alabama

Municipalities — Officers and Offices — Residence — Salaries.

1. A member of a municipal council receives the salary prescribed by the council not less than six months prior to the general municipal election at which he was elected.

2. A member of a municipal council must reside within the corporate limits of the municipality during his term of office.

3. A member of a municipal council may not waive his compensation.

4. Under the facts presented, a member of a municipal council is entitled to that part of his salary which accrued while he was on active duty in the United States Army Reserve.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion, under date of March 25, 1963, is as follows:

"I am a member of the Town Council of Mulga, Alabama. I had to serve six months active duty in the army reserve. I did not resign because I planned on serving on the council again when I finished serving in the army. My pay as a councilman was stopped for as

long as I was in the army. Is this according to law or should I have been paid during this time? I would appreciate an answer on this as soon as you find it convenient."

Reference is made to your letter of June 7, 1963, in which you enclose a copy of Ordinance No. 22, of the Town of Mulga, enacted March 17, 1960, more than six months prior to the date of the 1960 general municipal election.

Ordinance No. 22, supra, fixes the salaries of the members of your Town Council at Fifteen Dollars per month, payable monthly.

Title 37, Section 404, Code of Alabama 1940, as amended by Act No. 112, Acts of Alabama 1956, page 170, and Section 1 of Act No. 666, Acts of Alabama 1961, page 910, provides that the members of the council in a Municipality in this state shall receive such salaries as the Council may prescribe, not less than six months prior to each general municipal election. (See Quarterly Report of Attorney General, Vol. 81, page 50, for an interpretation of Section 404, supra, prior to the 1956 Amendment.)

It is true that a member of a municipal council must reside within the corporate limits of the municipality during his term of office. Title 37, Section 403, Code of Alabama 1940. However, a temporary absence from his residence, such as is occasioned by military service, will not vacate his office.

A member of a municipal council may not waive his compensation.

Our courts have held that such a waiver is against public policy. See cases cited in Quarterly Report of Attorney General, Vol. 88, page 8.

Title 35, Section 12, Code of Alabama 1940, as amended by Act No. 588, Acts of Alabama 1959, page 1476, reads as follows:

" 'All officers and employees of the State of Alabama, or of any county, municipality, or other agency or political subdivision thereof, who shall be active members of the Alabama national guard or naval militia, or of the officer's reserve corps of the United States Army, or of the reserve components of the United States Army, Navy, Marine Corps, Air Force, or Coast Guard, shall be entitled to military or naval leave of absence from their respective civil duties and occupations on all days that they shall be engaged in field or coast defense or other training or on other service ordered under the provisions of this chapter, or of the national defense act, or of the federal laws governing the United States reserves, without loss of pay, time, efficiency rating, annual vacation, or sick leave, but no such person granted such leave of absence with pay shall be paid for more than twenty-one working days at any one time.' "

The Town Council of the Town of Mulga holds two regular meetings per month. I am informed that no special meetings were held by said Council during the time you were on active military duty. Therefore, you were absent from twelve meetings of said Council while serving on active duty in the Army Reserve.

Premises considered, I am of the opinion that you are entitled to the prescribed salary as a member of the Town Council of the Town of Mulga, which accrued during your term of office while you were on active duty in the United States Army Reserve.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

June 17, 1963

Honorable Phillip J. Hamm
Commissioner, Revenue Department
Administrative Building
Montgomery, Alabama

Motor Vehicles — Licenses — License Tags

1. Trucks falling within the category of "for-hire" trucks under the schedules contained in Act No. 672 of the 1961 Session of the Alabama Legislature (Acts 1961, Volume 1, page 921) can be licensed on the monthly declining basis as is provided under Title 51, Section 697, Code of Alabama 1940, and this would apply even where they are brought into this State from another state during the license year, provided that such trucks meet the conditions prescribed in Section 697 for the purchase of license tags on the monthly declining basis.

2. Under the provisions of Section 697, supra, the privilege of purchasing a license tag for a truck (including a "for-hire" truck licensed under the schedules contained in Act No. 72, supra) on the monthly declining basis does not extend to any truck which was purchased prior to November 15 of the license tax year, regardless of where the truck was purchased.

3. A truck (including a "for-hire" truck) which cannot qualify for a license on the monthly declining basis under Section 697, supra, may be eligible to be licensed on the

half year basis as is provided in Title 51, Section 705, as amended, Code of Alabama 1940, where the truck was not used or operated on the highways of this State between October 1 and March 31, of the license tax year; which would include a truck which was brought into this State from another state during the year, but not until after the expiration of said period.

4. The owner of a truck which has been registered by his paying the regular truck license under Section 697, supra, can purchase a "for-hire" license for such truck under the schedules contained in Act No. 672, supra, on a monthly declining basis, where later during the same license year he converts said truck into a "for-hire" truck, and where he makes application for the "for-hire" truck license before he used the truck on the highways for hire; provided that the truck was not purchased until after November 15, and where the other conditions prescribed in Section 697, supra, for the monthly declining basis are met.

5. Under Act No. 672, supra, no credit can be given for the amount paid for a regular truck license purchased under Section 697, on a license purchased under Act No. 672, supra, where the owner of the truck converts it into a "for-hire" truck later in the same year, even though the owner makes application for the "for-hire" truck license before he uses the truck for hire.

Opinion by Assistant Attorney General Burton

Dear Sir:

Your request for an official opinion bearing date of May 27, 1963, is as follows:

"Your attention is called to Act No. 672 of the 1961 Session of the Alabama Legislature (Acts 1961, Vol. I, page 921) which levies the license tax on 'for-hire' trucks and truck tractors. Mitchie in the Recompiled Alabama Code of 1958, has included Act No. 672, supra, under Article 8 of Title 51, which relates to the licensing of motor vehicles in this State, and immediately following Title 51, Section 697, Code of Alabama 1940, relating to the licensing of trucks, and has designated it as Section 697(1).

"Section 697, supra, provides under certain conditions for the licensing of motor trucks on a monthly declining basis. My questions are as follows:

"1. Can a license levied under Act No. 672, supra, on a 'for-hire' truck be purchased on a monthly declining basis such as is provided for under Title 51, Section 697, Code of Alabama 1940?

"2. If your answer to my first question is in the affirmative, then can the 'for-hire' license provided for under Act No. 672, supra, be purchased on a monthly declining basis where a 'for-hire' truck has been broought into this State from another state during the license tax year, and after November 15, i.e., July 1963?

"3. If your answer to my first question is in the affirmative, then can the owner of a truck who has properly purchased the regular truck tag at the beginning of the license tax year, and who later during the same year converts his truck into a 'for-hire' truck as contemplated by Act No. 672, supra, purchase the 'for-hire' truck tag on a monthly declining basis?

"4. If the owner of the truck under question No. 3 can purchase the 'for-hire' tag on a monthly declining basis can a credit be given for his regular truck tag on the amount paid for the 'for-hire' tag? "As the foregoing questions are of state wide interest and concern, I request that you please answer them in a formal opinion and at your earliest convenience."

In the beginning let me say that this opinion will be confined to a consideration of the licenses on motor trucks only, and not to any other type of motor vehicle.

1. Your first question is answered in the affirmative.

The license tax for trucks is levied under Title 51, Section 697, Code of Alabama 1940. Section 697 also contains the following proviso concerning the purchasing of a truck license tag on a monthly declining basis.

"Provided, however, **except for trucks purchased prior to November fifteenth of any tax year** that the licenses called for under this section shall be purchased on a monthly declining basis of one-twelfth or for each month of the tax year, and that the purchaser shall only buy a license for the remaining months of the tax year." [Emphasis supplied.]

Until the passage and effective date on October 1, 1961, of Act No. 672 of the 1961 Session of the Alabama Legislature (Acts 1961, Vol. I, page 921), all trucks, including trucks used to haul for hire, were licensed under the provisions of Section 697 of Title 51, Code of Alabama 1940. And while in such status, trucks used to haul for hire were under Section

697, supra, and where the conditions contained in the proviso therein were met, licensed on the monthly declining basis the same as other trucks. This was also the case for many years, and since 1937 when the statute which is now Section 697 was amended to allow the purchase of truck license tags, under certain stated conditions, on the monthly declining basis. After its effective date on October 1, 1961, "for-hire" trucks have been licensed under Act No. 672, supra. The Act, however, is silent as to whether the monthly declining basis is applicable to "for-hire" trucks.

In consideration of the historical background of these truck license tax laws, it is apparent that there is a very close relationship between them. This is also manifested by the very title to Act No. 672, supra, which is as follows:

> "To revise the privilege license **schedules** relating to the registration of trucks, truck-tractors, trailers, and semi-trailers operated for hire, repealing conflicting laws." [Emphasis supplied]

The privilege license schedule mainly referred to as having been revised as far as trucks being operated for hire are concerned is Section 697 of Title 51, supra. The Mitchie Company in its Recompiled Alabama Code of 1958, Pocket Part, was also clearly aware of this relationship between Section 697, supra, and Act No. 672, supra, in that it has under the motor vehicle license laws included Act No. 672 as a part of Article 8 of Title 51. Code of Alabama 1940, Recompiled 1958, Pocket Part, and as you say immediately following Section 697 and as 697(1). Moreover, there is clearly no conflict between Section 697 and Act No. 672 insofar as the proviso in Section 697 is concerned providing under certain conditions for the purchase of a truck license on the monthly declining basis. This proviso then has not been repealed in the case of "for-hire" trucks, and still appears to be applicable to such trucks.

This close relationship of these statutes being considered, together with the fact that there is nothing in Act No. 672, supra, which would expressly prohibit it, there is strong precedent to support the proposition that the mere inclusion of "for-hire" trucks in Act No. 672 for the purpose of separately licensing them, would not in itself deprive the owners of the trucks in this category of the right to continue to purchase a license on a monthly declining basis, where such trucks are otherwise qualified therefor. **Haden v. Lee's Mobile Homes, Inc.**, 136 So.2d 912, Cert. Den., 273 Ala. 708, 136 So. 2d 920.

2. The motor vehicle license laws which are the subject of your second question are for the most part a patchwork of amendments, and are not as clear as they should be and in some instances leave room for doubt and more than one construction. For this reason I cannot give a purely yes or no answer to this question.

Your second question is answered then to the effect that **if the truck was not purchased** until after November 15 of the tax year and was brought into the State after November 15, i. e., July 1963, then a license can be procured for it on a monthly declining basis. No distinction can be made in this respect. This applies equally as well to "for-hire" trucks as to other trucks.

The following provisions of the proviso contained in Section 697 are particularly applicable:

> "Provided, however, **except for trucks purchased prior to November fifteenth** of any tax year that the license called for under this section shall be purchased on a monthly declining basis. . . ." [Emphasis supplied.]

In the three latest opinions of this office on this subject this proviso in Section 697 has been given a strict interpretation, and the phrase "except for trucks purchased prior to November fifteenth of any tax year," a very literal meaning. Quarterly Report of the Attorney General, Volume 14, page 269, Quarterly Report of Attorney General, Volume 16, page 148, and Quarterly Report of the Attorney General, Volume 33, page 21. Thus, in order for a truck (including a "for-hire" truck) to qualify for the monthly declining basis under Section 697, supra, **it must have been purchased subsequent to November 15** of the license tax year involved. Under the circumstances, then a truck brought into the State from another state after November 15 can qualify for a license on the monthly declining basis only if it was purchased after November 15 of the tax year. Moreover, under the opinions referred to it appears that the truck must have been purchased new after November 15 of the tax year in order for the monthly declining basis to apply. The place or state where the truck is purchased seems immaterial.

You have in inquiring about this aspect of the matter also asked orally whether a truck purchased prior to November 15 of the tax year, and brought into the state after November 15, i.e., in July 1963, if held not to be qualified for a license on the monthly declining basis, could be licensed on a half-year basis as is provided in Title 51, Section 705, as amended, Code of Alabama 1940.

Section 705, as amended in 1951, supra, now reads in material part in this respect, as follows:

> "One-half of the license herein provided for shall be paid plus one dollar where the motor vehicle is stored in this state and not used and operated between the period from October first through March thirty-first following."

Prior to the 1951 Amendment, Section 705, as amended, supra, in pertinent part read:

"One-half of the license herein provided for shall be paid plus one dollar where the motor vehicle is acquired or brought into the state on or after May fifteenth of any year, or is not used or operated between the period from November fifteenth through May fourteenth."

This office held under this statute as so worded and before being amended in 1951 that a "half-year license tag may be purchased for [a] motor truck bought prior to November 15 where same is brought into [the] state after April 1." Quarterly Report of Attorney General, Volume 16, page 148.

The 1951 Amendment substituted the words **"stored in this state and not used or operated from October first through March thirty-first,"** for the words **"where the motor vehicle is acquired or brought into the state on or after May fifteenth of any year, or is not used or operated between the period from November fifteenth through May fourteenth following."**

This amendment was obviously necessary because in 1943 Section 705 of Title 51, supra, was amended to change the due date for all motor vehicle licenses from November 15, as originally provided, to **October 1.** This also had the effect of changing the date of the commencement of the half year from May 15 to **April 1,** as is now provided.

The historical background of these statutes being considered, it is my opinion that it was not the intention of the legislature to deprive the owners (or to in effect discriminate against them) of trucks which were purchased prior to November 15, but which were not brought into this State until on or after April 1 of the tax year, of the privilege of purchasing a half-year license for such trucks. In this connection, I have been informed by certain officials of the State Department of Revenue who drafted this amendment that it was not intended to deprive the owners of this category of trucks of purchasing the half-year license, and that the word "and" was inadvertently used instead of the word "or." That the real purpose of this amendment was to include all trucks which were stored in this State **or** "not used or operated between the period October first through March thirty-first following." Therefore, this Section (like it was prior to this amendment) was intended to apply to all trucks which are purchased prior to November 15, but which are not brought into the state until on or after April 1 of the tax year, or which are "not used or operated" on the highways of this State until on or after April 1.

The courts on numbers of occasions have construed the word "and" to mean "or," where it was the obvious legislative intent to use the disjunctive rather than the conjunctive, and where the real purpose of the statute would otherwise be defeated. Thus, "and" and "or" under such

circumstances have been held to be used interchangeably. Black's Law Dictionary, Third Edition, pages 110 and 1296; also see **Weisman v. Continental Life Ins. Co.,** 216 Mo. App. 13, 267 S.W. 21,23, **State v. Harwi,** 117 Kan. 74, 230 P. 331, 332; **In Re Opinion of the Justices,** 252 Ala. 194, 41 So.2d 559, etc.

This construction placed on this part of Section 705 appears to be in full keeping with the real intent and purpose of the motor vehicle license tax laws, as such laws are said to levy taxes for the privilege of operating a motor vehicle on the public highways, and for the use of the highways of this State. It also follows that where a motor vehicle is stored or otherwise not used or operated on the highways during an entire license tax year, then there would be no motor vehicle license tax due as to such vehicle for that particular tax year. Biennial Report of the Attorney General, 1936-1938, page 532, Quarterly Report of the Attorney General, Volume 10, pages 98 and 99, and **Williams v. Albany,** 216 Ala. 408, 133 So. 257. To interpret this provision of Section 705, as amended in 1951, supra, then to include trucks which do not qualify for the monthly declining basis, and which are not brought into this State or otherwise used and operated on the highways of this State until on or after April 1 of the tax year would also be in full keeping with the very intent and purpose of the motor vehicle license tax laws in general.

In an informal opinion of this office, No. 107, dated March 25, 1963, and addressed to the Honorable Bradley Brown, Director of Revenue, Jefferson County, Alabama, the following ruling was made after Section 705 was amended in 1951:

> "It is my opinion that the half year license is authorized under Title 51, Section 705, Code of Alabama 1940, as last amended, for any motor vehicle, except those licensed under the provisions of Act No. 315, General and Local Acts 1951, page 610 (three-dollar license), which is not used or operated on the highways of this State during the period from October 1 through March 31 following."

This opinion has never been overruled, and it appears to be correct. It also very clearly covers trucks, and would now also include "for-hire" trucks licensed under Act No. 672, supra.

3. My answer to your third question is in the affirmative, if the truck involved was purchased after November 15 of the license year, and application for a "for-hire" truck license was applied for after that date and before the truck was used on the state highways as a "for-hire" truck and the license had become delinquent.

Act No. 672, Section 1(c), supra, provides as follows:

"The owner of a motor truck or truck-tractor operated for hire may voluntarily increase the allowable gross weight for which his

vehicle is licensed by purchasing the license hereinabove prescribed for the appropriate weight classification and paying the difference in fees between the license which is surrendered and that for the higher weight classification desired. The license classification may not be decreased for a vehicle, however, except once a year at the time new license tags or plates are purchased for such vehicle. If upon inspection any vehicle licensed hereunder is found to weigh more than is permitted by the license plates which it carries (regardless of whether such weight is below the legal maximum permitted for other than licensing purposes), the owner of such vehicle shall purchase immediately a new license for the weight of the vehicle as inspected. In such an event no credit shall be allowed for the surrendered under-rated license plates or tags, and the owner of the vehicle shall be subject to the penalty prescribed by law for using a motor vehicle with an improper license." [Emphasis supplied.]

The above quoted provisions of Act No. 672, supra, do not provide for a credit to be given for the regular truck tags when a regular truck, licensed under the schedules provided in Section 697, supra, is converted by its owner into a "for-hire" truck during the license tax year, and the owner makes application for the "for-hire" tag under the schedules contained in Act No. 672. The credit provided for in said Act is permissible only where the owner voluntarily increases the allowable gross weight of a truck which has already been licensed as a "for-hire" truck under Act No. 672 during the license year, and where a higher "for-hire" truck license is later required under the schedules provided for in Act No. 672.

The foregoing being considered, there is no provision in Act No. 672, supra, or otherwise that can be found in the motor vehicle license tax laws which would authorize the owner of a truck who has purchased the regular truck tag under Section 697, supra, to receive a credit for the amount paid for such tag on the price of a "for-hire" tag, where he converts the truck to a "for-hire" truck during the same license tax year. This would also be true even though the owner makes application for the "for-hire" tag before he converts the truck or uses it on the highways to haul for hire.

The owner of the truck then would have to virtually start from scratch in procuring, under the circumstances, a "for-hire" tag. This being the case, and if the owner makes application for the "for-hire" tag, and purchases the license under the schedules contained in Act No. 672, before he uses the truck on the highways as a "for-hire" truck, then in my opinion the truck can be treated as being used and operated on the highways for the first time for the year involved as a "for-hire" truck on the date that it is first used during the license year to haul for hire. Thus, it is my opinion that where the truck can meet the qualifications and conditions governing the issuance of a tag on the monthly declining basis as have already been discussed and outlined in my answer to your second

question, the owner would be entitled to purchase the "for-hire" tag on the monthly declining basis as prescribed in Section 697, supra, on the same basis as the owner of any other truck which is qualified therefor.

4. My answer to your fourth question is in the negative.

No credit can be given for the amount paid for the regular truck license tag under the schedules contained in Section 697, supra, where the owner converts the same truck into a "for-hire" truck later during the same license tax year, and has to procure a "for-hire" tag under the schedules contained in Act No. 672, supra. The reasons for this have already been stated in my answer to your third question.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

June 26, 1963

Honorable Frank H. Amberson
Mayor, City of Boaz
Boaz, Alabama

Appropriations — Municipalities.

1. A municipality is not liable for injuries arising from the performance of its governmental functions.

2. A municipality may not appropriate public funds to aid in the payment of hospital and medical expenses of a fireman injured in the line of duty.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion, under date of May 15, 1963, is as follows:

"As Mayor of the City of Boaz, Alabama, I respectfully request of you an opinion as to the following:

"Mr. Maurell Thomas, who was at the time a volunteer fireman for the City of Boaz, was severely injured while fighting a fire in line of his duty as such fireman. His ankle was broken and he suffered

this injury, which has caused a permanent partial disability. As a result, in addition to some accident insurance, he incurred hospital and medical expenses in the sum of approximately $2,300.00. He was not covered by Workmen's Compensation insurance.

"The city desires to reimburse him, if legal, for his hospital and medical expenses incurred over and above all accident insurance benefits received, and I would like your opinion as to whether or not the city can legally do this."

A municipal fire department performs a governmental function. **State ex rel. Hyland v. Baumbauer et al,** 244 Ala. 1, 12 So. 2d 326. A municipality is not liable for injuries arising from the performance of its governmental functions. **Chaffin v. City of Montgomery,** 273 Ala. 492, 142 So. 2d 267.

Therefore, there is no tort liability of a municipality for injuries sustained by its firemen in the line of duty.

A municipality is an instrumentality of the State and its powers are derived from and must be conferred by the legislature. **Town of Graysville v. Johnson,** 33 Ala. App. 479, 34 So. 2d 708. Every agency, instrumentality or subdivision of the State, charged with the duty of devoting public funds to the ends prescribed by law, must point to express or implied statutory authority for every disbursement. **Woodruff v. Beeland,** 220 Ala. 652, 127 So. 235. I find no such authority for the proposed payment to which your request refers.

Some of the opinions of this office have held as follows:

1. A county is not authorized to pay the hospital and medical expenses of an employee injured by a dump truck of the county. Biennial Report of Attorney General, 1930-32, page 635.

2. A county is not authorized to pay for medical services for an employee injured while performing his duties in connection with road building or maintenance. Biennial Report of Attorney General, 1934-36, page 185.

3. A county board of education is not authorized to pay the hospital expenses and buy an artificial foot for a child injured by a school bus. Biennial Report of Attorney General, 1934-36, page 717.

4. A board of revenue has no authority to expend county funds to aid in the purchase of an artificial leg for an employee injured in the course of duty. Quarterly Report of Attorney General, Vol. 46, page 19.

5. A city board of education may not pay the hospital bill of

regular maintenance employees injured in the line of duty. Opinion to Honorable I. J. Browder, Superintendent, Gadsden City Schools, under date of July 28, 1959 (not reported).

These are some of the opinions of this office which have applied the principles of **Woodruff v. Beeland,** supra.

Premises considered, I am of the opinion that the City of Boaz may not pay the hospital and medical expenses to which your request refers.

Very truly yours.

RICHMOND M. FLOWERS
Attorney General

INDEX

QUARTERLY REPORT OF THE ATTORNEY GENERAL FOR THE PERIOD FROM APRIL 1, 1963 THROUGH JUNE 30, 1963

VOLUME 111

— A —

ABSENTEE BALLOTS:

Absentee ballot list—Governmental employees and officials eligible for 40

Procedure for placing names on the absentee ballot list—Right granted thereby and removal of name from regular poll list 40

ACTS (GENERAL AND LOCAL)

GENERAL AND LOCAL ACTS 1949:
Page 361, as amended (Jurisdiction for trial of violations of rules of the road in Lee County.) 12

GENERAL AND LOCAL ACTS 1953
Page 994 (Apiary inspections) 58

GENERAL AND LOCAL ACTS 1957:
Page 332, as amended (Mineral documentary tax) 49

Page 1170 (Ex-officio clerk's fees) 34

GENERAL AND LOCAL ACTS 1959:
Page 989 (University of Alabama Mental Hospital Bonds) 29

GENERAL AND LOCAL ACTS 1961:
Page 1484 (Group insurance for hospital personnel) 51

AD VALOREM TAXES:

Procedure for correcting erroneous assessments by Board of Equalization 25

AGRICULTURE AND INDUSTRIES—AGRICULTURAL CODE:

State Apiarist—Commissioner may designate any employee of department as 58

APPROPRIATIONS:

County—Construction of municipal stadium 18

Municipal funds used to purchase county high school band uniforms 39

Municipality may not use public funds to pay medical expenses of injured firemen 92

— B —

BLIND PERSONS:

Aid to—Department of Pensions and Security authorized to meet Federal standards 55

BOXING AND WRESTLING COMMISSION:

Jurisdiction of wrestling matches held in TV studios 28

— C —

CHECKS:

License issued for worthless check invalid 53

Public official responsible for checks he accepts 53

CHEROKEE COUNTY:

Gasoline tax warrants proceeds transferred to State Highway Department 23

CLERKS OF COUNTY COURTS:

Costs and fees—trial fee and solicitor's fee 34

CLERKS OF INFERIOR COURTS:

Courts of Common Pleas of Lee County—authority of clerk 12

CODE OF ALABAMA 1940:

Title 11, Section 81 (Fees in criminal cases) 34

Title 21, Section 99, as amended (Funds of insane persons) 46

Title 51, Section 618, as amended (Filing tax for deeds) 68

Title 51, Section 619(D) (Filing tax exemption for additional security mortgage) 76

CODE OF ALABAMA 1940, RECOMPILED 1958:

Title 11, Section 89(2) (Fees of ex-officio clerk) 34

Title 48, Section 301(2), Subscetion A(3) (Transportation of agricultural commodities) 21

COMMISSIONER OF LICENSES:

Personally responsible for checks accepted 53

COMPENSATION:

Milk Control Board members 61

COMPTROLLER:

Court costs paid by—supplemental cost bills 9

CONSTITUTIONAL AMENDMENTS:

No. 141 (University of Alabama Mental Hospital Bonds) 29

CONSTITUTION OF ALABAMA 1901:

Section 8 (Protection against prosecution by information) 12

Section 168 (Providing for justices of the peace) 12

Amednment No. 141 (University of Alabama mental hospital bonds) 29

CONTRACTS:

Franchise—between municipality and utility—consideration, etc. 14

CORPORATIONS:

Officer and stockholder, member of Water Works Board—may transact business with municipality and said Board 44

Participation in partnerships and joint ventures 17

COSTS AND FEES:

County Court—trial and solicitor's fee 34

Sheriffs—no arrest fees unless defendant indicted on felony charge 66

Sheriffs—for removal of prisoners 73

Reciprocal non-support act cases 9

Sheriffs—relating to lunacy inquisition 73

COUNTIES:

Appropriation for construction of muncipal stadium 18

Arrest fees—not a claim against county unless defendant indicted on felony charge 66

Deputy Sheriffs' expenses at law enforcement officers' school may be paid by 42

Lease of idle machinery—disposition of income therefrom 18

Where road system maintained by State—Gasoline tax warrant proceeds transferred to State Highway Department 23

COUNTY BOARD OF EDUCATION:

May use city funds to purchase band uniforms 39

COURTS:

Court of Common Pleas of Lee County—jurisdiction—authority of clerk—misdemeanors 12

CRIMINAL LAW:

Clerk of Court of Common Pleas may not nolle prosequi on own motion 12

Misdemeanor jurisdiction of Court of Common Pleas of Lee County 12

Misdemeanor jurisdiction of Justices of the Peace and Inferior Courts 12

— D —

DEEDS:

Filing tax—executor's deed to trustees not subject to—contra where personal property involved 68

DEKALB COUNTY:

Gasoline tax warrants proceeds transferred to State Highway Department 23

DEPOSITORIES:

Disposition of gasoline tax warrants proceeds in counties where road system has been transferred to State Highway Department 23

— E —

ELECTIONS:

Abentee ballot list—governmental officials and employees eligible for 40

Absentee ballot list—procedures relating to 40

Three-mill school tax—district and county-wide held simultaneously 37

To change form of city government—change becomes effective next general election year 78

EXECUTORS:

Deed to trustees not subject to filing tax—contra where personal property involved 68

— F —

FIDUCIARIES:

Corporate—participation in partnership 17

FILING TAX:

Executors deed to trustees not subject to—contra where personal property involved 68

Exemption—additional security mortgage 76

Mineral interest—instruments granting or reserving 7

Mineral documentary tax 49

FINE AND FORFEITURE FUND:

Arrest fees not a claim against—unless defendant indicted on felony charge 66

FUNDS:

Disposition of gasoline tax anticipation warrants in counties where road system has been transferred to State Highway Department 23

Municipal—may be used to purchase county high school band uniforms 39

University of Alabama Hospital Building Bond funds may be used for addition to existing hospital 29

— G —

GASOLINE AND GASOLINE TAX:

Disposition of gasoline tax warrants proceeds in counties where road system has been transferred to State Highway Department 23

GOVERNMENT:

Municipal form changed by electorate—effective date 78

— H —

HIGHWAYS AND HIGHWAY DEPARTMENT:

Disposition of gasoline tax warrants proceeds in counties where road system has been transferred to State Highway Department 23

HOSPITALS:

Addition to existing hospital building and equipment thereof considered to be hospital building and its equipment 29

Directors of County Hospital Board may not be insured under group plan where hospital pays a part of the premium 51

— I —

INFERIOR COURTS:

Court of Common Pleas of Lee County—jurisdiction—authority of clerk—misdemeanors 12

INQUESTS:

Sheriffs fees relating to lunacy inquisition 73

INSANE PERSON:

Funds belonging to—paid to proper person in another state—Director of hospital 46

Lunacy inquisition—sheriffs' fees 73

INSURANCE:

Group plan for hospital employees—county hospital board directors may not participate therein 51

— J —

JUDGES OF PROBATE:

Personally responsible for checks accepted 53

JUSTICES OF THE PEACE:

Jurisdiction—misdemeanors 12

Legislature may abolish all or any part of jurisdiction of 12

— L —

LEE COUNTY:

Court of Common Pleas—misdemeanor jurisdiction—authority of clerk to nolle prosequi 12

LICENSES:

Dealers motor vehicle 71

Issued for worthless check—invalid 53

Motor vehicle—"for hire" trucks—purchase on monthly declining basis 84

Public utility—consideration for municipal franchise may exceed privilege license fee 14

LICENSE TAGS:

"For hire" trucks—purchase on monthly declining basis 84

— M —

MARSHALL COUNTY:

Costs and fees—county court—trial fee and solicitor's fee 34

MILK AND MILK CONTROL BOARD:

Compensation—subsistences and travel expenses 61

MINERAL DOCUMENTARY TAX:

Discussed generally 49

Instruments granting or reserving mineral interest 7

MORTGAGES:

Filing tax exemption—additional security mortgage 76

MOTOR VEHICLES:

Dealer licenses 71

Licenses issued for worthless check invalid 53

Licenses—purchase of for "for hire" truck on a monthly declining basis 84

MUNICIPALITIES:

Birmingham City Council—member must serve on Park and Recreation Board 80

Charge for services of public utility not a tax 63

Contracts with public utility for franchise—consideration may exceed license fee 14

Expansion of city limits automatically expands city school district 37

Form of government changed by electorate 78

May transact business with corporation of which Water Works Board member is officer and stockholder 44

Member of council receives salary while on active military duty 82

Not liable for injuries incurred in performance of governmental function 92

Operation of public utility not a governmental function 63

Public funds not used to pay medical expenses of injured firemen 92

Public utility operated by—refunds to customers of 63

Recreation Board—county appropriation for construction of municipal stadium 18

— N —

NON-SUPPORT:

Reciprocal Act cases—costs and fees 9

— O —

OFFICERS AND OFFICES:

Birmingham City Council member must serve on Park and Recreation Board 80

City Council member receives salary while on active military duty 82

Water Works Board member—officer and stockholder of corporation—no bar to corporate transactions with city 44

OPINIONS OVERRULED, MODIFIED OR DISTINGUISHED:

Volume 22, page 153 68

Volume 47, page 170 42

— P —

PENSIONS AND SECURITY, DEPT. OF:

Authority to meet Federal standards relating to aid to the blind 55

PRISONS AND PRISONERS:

Sheriffs' fees for removal of prisoners 73

PUBLIC SERVICE COMMISSION:

Sulphuric acid—not a fertilizer exempt from transportation supervision of 21

PUBLIC UTILITIES:

Contract with municipality for franchise 14

Incorporation of municipality within area served—effect 14

Operated by municipalities—service charge not a tax—refunds 63

— R —

REFUNDS:

Public utilities operated by municipalities 63

REGISTERS:

Costs and fees—reciprocal non-support cases—supplemental cost bills 9

RESIDENCE:

City council member must reside within corporate limits 82

— S —

SALARIES:

City council member receives salary while on active military duty 82

SCHOOLS:

City funds used to purchase county high school band uniforms 39

Municipal—expansion of limits automatically expands school district 37

Three-mill tax—elections for district and county-wide tax—held simultaneously 37

SHERIFFS:

Arrest fees not a claim against county unless defendant indicted on felony charge 66

Expenses of deputy sheriffs at law enforcement officers school may be paid by county 42

Lunacy inquisition—fees related to 73

Removal of prisoners—fees for 73

SOLICITORS:

Fees in county court cases 34

— T —

TAXATION:

Filing tax exemption—additional securiy mortgage 76

Mineral documentary tax 49

Public utilities operated by municipalities—service charge not a tax 63

THREE-MILL TAX:

Elections—county-wide and district—may be simultaneous 37

TRUST AND TRUSTEES:

Executor's deed to trustees not subject to filing tax—contra where personal property involved 68

— U —

UNIVERSITY OF ALABAMA:

Hospital building bond funds may be used for addition to existing facilities 29

— W —

WINSTON COUNTY:

Gasoline tax warrants proceeds transferred to State Highway Department 23

WORDS AND PHRASES:

"Per annum" means fiscal year 61

"Sulphuric acid" not a fertilizer exempt from transportation supervision of Public Service Commission 21